160 U.S. 217

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~981~~ 99

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN C. GIBNEY AND HARVEY BARTLEY, COPARTNERS AS J. C. GIBNEY & COMPANY; J. B. McELWAINE, AND J. B. WHEELER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED MARCH 25, 1892.

(15,001.)

(15,001.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894.

No. 381.

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN C. GIBNEY AND HARVEY BARTLEY, COPARTNERS AS J. C. GIBNEY & COMPANY; J. B. McELWAINE, AND J. B. WHEELER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

INDEX.

	Original.	Print.
Citation	1	1
Proof of service of citation	2	1
Writ of error (copy)	3	1
Caption	4	2
Order filing complaint	4	2
Order entering appearance for defendants	4	2
Order on defendants to answer	5	2
Order filing motion to make complaint more specific	5	3
Motion to make complaint more specific	5	3
Order filing amended complaint	6	3
Amended complaint	6	3
Exhibit A—Agreement between the Interior Construction and Improvement Company and J. C. Gibney & Company, October 10, 1889	15	8
B—Bond of J. C. Gibney & Co. to the Interior Construction and Improvement Company, October 26, 1889	25	13
C—Statement of account	26	14

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 7, 1895.

	Original.	Print.
Order on defendants to answer	31	18
Order filing plea in abatement	31	18
Plea in abatement	31	18
Order filing demurrer	32	18
Demurrer to plea in abatement	32	18
Order overruling demurrer	32	18
Judgment	32	19
Allowance of writ of error	33	19
Petition for writ of error	33	19
Assignment of errors	33	19
Order approving bond, &c	34	19
Bond on writ of error	34	20
Clerk's certificate	36	20

1 United States of America to John C. Gibney, Harvey Bartley, copartners as J. C. Gibney & Company; J. B. McElwaine, and J. B. Wheeler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 18th of April, 1892, next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein The Interior Construction and Improvement Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana & *ex officio* judge of said circuit court, this 18th day of March, in the year of our Lord one thousand eight hundred and 92.

Seal Circuit Court of the United States, District of Indiana.

W. A. WOODS.

2 On this — day of ——, in the year of our Lord one thousand eight hundred and —, personally appeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — day of ——, A. D. 187–.

—— ——.

Service of this writ is hereby acknowledged.

H. J. MILLIGAN,
Attorney for the Defendants in Error.

3 UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings, as also on the redition of a judgment in a plea which is in the said circuit court, before you, between The Interior Construction and Improvement Company and John C. Gibney, Harvey Bartley, copartners as J. C. Gibney & Company; J. B. McElwaine, and J. B. Wheeler, a manifest error hath happened, to the great damage of the said The Interior Construction and Improvement Co., as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the rec-

ord and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 18th day of April, 1892, next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice [SEAL.] of the Supreme Court of the United States, and the seal of said circuit court, this 18th day of March, A. D. 1892.

NOBLE C. BUTLER, *Clerk.*

4 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday in November, in the year of our Lord one thousand eight hundred and ninety-one, before Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex officio* judge of said circuit court.

THE INTERIOR CONSTRUCTION AND IMPROVEMENT Company, a Corporation Organized under the Laws of the State of New Jersey.	No. 8606. Civil Action.
vs.	
JOHN C. GIBNEY, HARVEY BARTLEY, Copartners as J. C. Gibney & Company, and J. B. McElwaine and J. B. Wheeler.	

Be it remembered that heretofore, to wit, at the May term of said court, on the 9th day of June, 1890, before Honorable William A. Woods, judge of said court, the following proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by John C. Donnelly and F. S. Smith, its attorneys, and files its complaint herein in the words following, to wit:

(Amended complaint filed November 6th, 1890.)

And afterwards, to wit, at the May term of said court, on the 19th day of June, 1890, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, John C. Gibney, James B. McElwaine, and James B. Wheeler, by H. J. Milligan, Esq., their attor-
5 ney, and enter their appearance herein.

And afterwards, to wit, at the May term of said court, on the 18th day of July, 1890, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Upon motion of the plaintiffs, the defendants appearing are ruled to answer herein by September 1st, next.

And afterwards, to wit, at the May term of said court, on the 1st day of September, 1890, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants, heretofore appearing, by H. J. Milligan and Duncan & Smith, their attorneys, and file their motion to make the complaint herein more specific; which motion is in the words following, to wit:

The defendants move the court to require the plaintiff to make its complaint more specific in the following particulars:

1st. So as to specify with particularity wherein the work was "imperfectly and defectively done and not done in a safe and workmanlike manner."

2nd. So as to specify wherein the trenching was not done in accordance with the contract, and wherein the calking and pipe-laying was incomplete, imperfect, and defective.

3rd. Wherein was the work continued in an imperfect and careless manner until about December 15th, as alleged in section four of its complaint, on page 3.

4th. So as to specify with particularity what portion of the line constructed by the defendant Gibney & Co. did plaintiff go over.

6 5th. What defect did the plaintiff remedy therein?

H. J. MILLIGAN,
DUNCAN & SMITH,
Attorneys for Defendants.

And afterwards, to wit, at the November term of said court, on the 6th day of November, 1890, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by John C. Donnelly and Frank Sullivan Smith, *his* attorneys, and files its amended complaint herein in the words following, to wit:

The amended complaint of said Interior Construction and Improvement Company, plaintiff, against said John C. Gibney, Harvey Bartley, copartners as J. C. Gibney & Company; J. B. McElwaine, and J. B. Wheeler, defendants, respectfully show unto the court:

1. That it is a corporation duly incorporated under the laws of the State of New Jersey and is a citizen thereof and is the obligee named in a certain bond, a copy of which is hereto attached, marked Exhibit "B," and made a part hereof, as the Interior Construction and Improvement Company of New York City, and that it has a right of civil action against the above-named defendants, who are all citizens and residents of the State of Indiana.

2. That in the month of October, 1889, and for some time prior thereto it was engaged in the work of constructing a pipe line from a point on the State line between Ohio and Michigan and near Toledo, in Ohio, to the city of Detroit for the conveyance and
7 transportation of natural gas from the Ohio natural gas fields to said city of Detroit; that paintiff was doing said work for

the Michigan Gas Company, which had received, by ordinance duly adopted, permission from the city of Detroit to lay pipes in the streets and alleys in said city for the distribution of natural gas, provide the pipe line from the gas fields in Ohio to Detroit, and said gas company was ready to furnish gas to the citizens of Detroit by January 1, 1890, and that it became of great importance that said pipe line should be promptly constructed; that under plaintiff's contract with the gas company it furnished the pipe and all materials and work and labor for construction.

3. That on the 10th day of October, 1889, plaintiff entered into a contract with the defendants John C. Gibney and Harvey Bartley, doing business as copartners under the partnership name of J. C. Gibney & Co., by the terms of which said Gibney and Bartley agreed to do all the digging of trenches, laying of pipe, testing, back-filling, calking, and all the work in connection with the laying of the main pipe line from a point near La Salle, in Michigan, to the westerly line of the city of Detroit, for a certain price to be paid therefor by the plaintiff, to wit, one thousand dollars per mile for the twelve (12) and fourteen (14) inch pipe and twenty-five cents (25) per lineal foot for the sixteen-inch pipe; said work to be commenced on October 14th, 1889, and fully completed, finished, and delivered on or before the 20th day of November, 1889, and the same to be done in manner and form as set forth and provided for in certain specifications attached to and forming a part of said contract; that said contract and specifications were duly reduced to writing and signed
8 by the said plaintiff and by the said Gibney and Bartley, under the partnership name of J. C. Gibney & Co., and a copy thereof is hereto attached, marked Exhibit "E," and made a part of this complaint, and for further information and greater certainty plaintiff refers to the same.

4. That by the express terms of said contract time was of the essence thereof, and said contract also provided that said Gibney and Company should give a bond, with sufficient sureties, to be approved by the plaintiff, and conditioned for the faithful performance of the contract.

5. That said Gibney and Company entered on the performance of said contract and for a time continued at work thereon, and plaintiff alleges that it fully performed all of the conditions and agreement in said contract contained by it to be performed, but, as plaintiff alleges, they utterly failed in the performance of the same. The said Gibney & Company failed to do the work in form and manner as provided for in said contract, in this, that the work was imperfectly and defectively done and not done in a safe and workmanlike manner. The trenching was not done in accordance with the contract, the caulking and pipe-laying was incomplete, imperfect, and defective, so that there were many leaks in the line, and the calking was not tight and perfect, nor did said Gibney & Company complete said work by the 20th day of November, 1889, as provided for in the contract, but utterly failed so to do, and although urged and requested by plaintiff, never completed said work, but continued to work in an imperfect and careless manner on said job until De-

cember 15th, when the said pipe line was not over three quarters laid, and what was done was, as above stated, defective and imperfect, and plaintiff was finally compelled to and did exercise its right under the contract to put on additional men to complete said work. After due notice of plaintiff's intention so to do and afterwards, on or about December 18th, 1889, said Gibney & Company wholly abandoned said work and neglected and refused to complete the same, and thereupon plaintiff took possession thereof and completed the same, and was compelled to and did go over a large portion of the line constructed by Gibney & Company and at great expense and labor remedy the defects therein.

6. Plaintiff further shows unto the court that amongst other things that the work done by said Gibney & Company was imperfectly and defectively done, and not done in a workmanlike manner, in the following respects—that is to say, that the trenching was not done in accordance with the contract, and more particularly in this, that for a space of three miles on said line north of a place called Sibley and between Sibley and Wyandotte three miles of said trench was not dug at all, and the same had to be dug by plaintiff to complete said line.

That no bell-holes were dug in any portion of said trench between a point one mile south of Newport, on said line, to the city limits of Detroit, a distance of about twenty-two miles, and for a great portion of the line the trench was dug too deep, so that the pipe had to be blocked up, which rendered it impossible to make a perfect or even reasonably safe or durable pipe line in consequence thereof, and also extra labor and material had to be used in endeavoring to complete said line in a workmanlike manner, and also, in consequence thereof, said line is liable — sag when the blocking rots out, causing it to break at the joints, loosening the calking, and resulting in leaks and imperfections of like character, and in endeavoring to remedy, so far as was possible, the said defective work great expense was rendered necessary on the part of the plaintiff.

No trench was excavated across the River Rouge for the double pipe line, as called for by the contract, and plaintiff was compelled to and did, at great expense, dig said double trench.

The calking and pipe-laying was incomplete, imperfect, and defective in many respects, and more particularly as follows:

About two miles of the line between Rockwood and Newport was not poured and filled—that is, no lead was run in the joints, as required, and plaintiff had to furnish the lead and pour and fill the same and also caulk the same

From the charcoal kilns to a point near the River Rouge, a space of about seventeen miles of said line, the lead was poured in the joints and no caulking was done thereon, with the exception of about three-fourths of a mile north of Wyandotte and about one-half mile north of Ecore. The pipe had been laid in the trench and was permitted to remain there several days without anything being done thereto, and on account of the advanced season of the year heavy rain-storms prevailed and the trenches and pipe became filled with water and it remained so and was in that condition when the said

Gibney & Company abandoned the work, and the said plaintiff, at great labor and expense and after long delay, rendered necessary by the bad condition in which the said portion of the line was left, completed the work; that in doing said work it had great difficulties and obstacles to overcome, caused by the filling of the trenches with water from time to time and the filling of said trenches on account of the heavy rains.

11 From about one mile south of La Salle to the charcoal kilns, a distance of about sixteen miles, the caulking was so defectively and imperfectly done that the same had to be recaulked in order to make the same reasonable complete and in accordance with the requirements of the contract, and plaintiff, at great expense and labor, did the same; that about six miles of the line from Monroe to a point south of La Salle had to be entirely re-excavated for the purpose of recalking, the work having been so imperfectly and defectively done that the same was rendered necessary, and plaintiff, at great expense and labor, did the said recaulking, re-excavating, and refilling. In consequence of the defects and imperfections — the calking and pouring great quantities of gas escaped from said pipe.

No portion of the line was laid across the River Rouge and plaintiff, at great labor and expense, had to construct the same.

The filling in of the line south of Monroe was imperfectly done and not properly tamped and had to be entirely gone over, at great expense by the plaintiff, and the same defect existed in the line north of Monroe and Newport.

The calking of the line south of Monroe was so defectively done as to require the constant time and work of a number of men in repairing it and putting — in a good and workmanlike condition.

That the filling of the line was not done as required by the contract in any portion thereof, and the same had to be gone over and filled and tamped and worked at in order to have the same completed by the plaintiff.

12 That by reason of the dilatory and careless manner in which the said Gibney & Company prosecuted the work on said line the completion of the same was delayed until during the months of November and December, when the weather became very wet and inclement; that the said months of November and December were very rainy and the completion of said work by the plaintiff in consequence thereof was attended with great difficulty and expense.

7. That under the provisions of said contract said Gibney & Company agreed to pay to said plaintiff the sum of five hundred dollars for each and every day which the work on said contract remained incomplete under the contract after November 20, 1889, and plaintiff shows that the same remained uncompleted until on or about the 23rd day of January, A. D. 1890, and by reason thereof said Gibney & Company became liable to pay to plaintiff the sum of thirty-one thousand five hundred dollars, with interest thereon from said last-mentioned date, which said Gibney & Bartley have

not paid, although requested so to do, but have neglected and refused so to do.

8. That plaintiff was compelled to and did lay out and expend a large sum of money, labor, and material in completing said work in accordance with the terms of the contract with said Gibney & Company, and in payment of damages caused by said Gibney & Company outside the right of way, and other claims chargeable to said Gibney & Company under said contract, in all amounting to thirty-one thousand one hundred and forty-five dollars and forty-one cents ($31,145.41) or thereabouts, which said plaintiff became entitled to have from said Gibney & Company as damages by reason
of his failure to construct said pipe line according to the terms
13 of said contract, which amount said Gibney & Bartley have
not paid to plaintiff, although requested so to do, but have neglected and refused so to do; that the balance due plaintiff in the premises on account of said liquidated damages, expense, and loss in completing said line according to contract and specifications is the sum of sixty-two thousand five hundred and seventy dollars and ninety cents ($62,570.90), over and above all credits and set-offs and counter-claims of said Gibney & Company or any other person or corporation whomsoever, and plaintiff is entitled to have and recover the same.

That on or about ——, 1890, a full, complete, and detailed statement of plaintiff's account with said Gibney & Company and claim for damages under said contract, and showing the balance of sixty-two thousand five hundred and seventy dollars and seventy-nine cents, was sent to said Gibney & Company and duly received by them, and request made for payment thereof, and no objection was ever made thereto by said Gibney & Company or either of said partners, and the same has thereby become an account stated, and plaintiff is entitled thereby to recover the full amount thereof; that a copy of said account so served on said Gibney & Company is hereto attached, marked Exhibit "C," and made a part hereof.

10. That in pursuance of the terms of said contract said Gibney & Bartley, under the firm name of J. C. Gibney & Co., as principals, and the defendants J. B. McElwaine and J. B. Wheeler, as sureties, made and delivered to the plaintiff their certain bond in the penal sum of twenty thousand dollars ($20,000), payable to said plaintiff, therein described as the Interior Construction and Improvement
Company of New York City, which said bond was condi-
14 tioned that if the said J. C. Gibney & Co. should well and
truly keep and perform all the terms and conditions of said contract on their part to be kept and performed, and should indemnify and save harmless the said Interior Construction and Improvement Company, as stipulated in said contract, then said bond to be void, otherwise to remain in full force and virtue. A copy of said bond is hereto attached, marked Exhibit "B," and made a part hereof. And plaintiff shows that a breach has occurred in the condition of said bond by reason of the failure of said J. C. Gibney & Co. to perform said contract, as hereinbefore alleged and set forth, and also in the failure of said J. C. Gibney & Company to pay and

discharge the account stated, hereinbefore set forth, and hereto attached as Exhibit "C."

11. Therefore, by reason of the premises, the said plaintiff is entitled to have and recover from said defendants the full sum of twenty thousand dollars, being the full amount of the penalty named in said bond, with interest thereon; and said defendants, although often requested so to do, have neglected and refused and still neglect and refuse to pay the same. Therefore plaintiff brings this civil action for the recovery of said amount.

JOHN C. DONNELLY,
Attorney for Plaintiff.
WM. E. NIBLACK,
Of Counsel.

15 EXHIBIT "A."

This agreement made and entered into this 10th day of October eighteen hundred and eighty-nine between the Interior Construction and Improvement Company of New Jersey of the first part and J. C. Gibney and Company of Indianapolis, State of Indiana of the second part, witnesseth:

That for and in consideration of the payments covenants and agreements herein mentioned and under the penalty of a bond of even date herewith, the parties mutually covenant and agree as follows:

1. The party of the first part shall be known and referred to throughout this agreement as the construction company and the parties of the second part shall be known and referred to throughout this agreement as the contractors.

2. The work and materials herein contracted to be performed and furnished shall in all respects be performed and furnished according to this contract and the specifications hereto attached containing six pages, and which are made a part and parcel of this instrument, and in conformity to the plans and under the directions and to the satisfaction and acceptance of said construction company.

3. The contractors for the consideration aforesaid hereby agree to furnish all materials (except the materials mentioned in the annexed specifications to be furnished by said construction company) and all labor necessary to complete the work contemplated by this agreement and the specifications hereto annexed, and to commence said work on the 14th day of October 1889 and to prosecute the same in the manner hereby required so as to fully complete finish
16 and deliver the same on or before the 20th day of November 1889.

4. The construction company in consideration of the covenants and agreements herein contained, agrees upon the performance of the agreements on the part of the contractors, and the acceptance of the same as herein provided, to pay in such manner and form and at such times as are hereinafter provided, to said contractors as follows:

One thousand dollars ($1,000) per mile for the twelve and four-

teen inch pipe, and twenty-five cents per lineal foot for the sixteen-inch pipe. Such payments to be in full for all labor (and materials which the specifications provide shall be furnished by said contractors) necessary in the construction of the work provided by this contract, except as hereinafter and in said specifications specifically provided. Payments are to be made on the estimate of the manager of the construction company and the engineer countersigned by the executive officer of the first party, as hereinafter provided, but the amount hereinafter retained as percentage on the work is never to be paid to the contractors if they do not complete the work in the time and in the manner agreed upon unless as hereinafter stated.

5. Estimates shall be made every two weeks by the manager and engineer of the construction company (every second Saturday) for the work done during the two weeks previous, and payments thereon shall be made at the rate of eighty-five per cent. of the completed work as per estimate of the engineer and manager, and the payment therein shall be made on the following Monday. Upon completion of all the work herein contracted for and in the time and manner agreed upon and after the satisfactory final test, the engineer
17 and manager will make a final estimate of all work done and within fifteen days after rendering the same to the construction company the said company shall pay to the contractors after deducting the previous payments, and any amount entitled to be retained according to the terms of this contract, the residue of the contract price due and payable upon said contractor's receipt for the same in full, upon such final estimate. Payments under this contract shall only be made on the properly certified estimate of the executive officer manager and engineer as above, and their decision of any question which may arise under this agreement shall be final and conclusive between the parties hereto, and the work shall be prosecuted in a workmanlike manner so as to fully complete finish and deliver the same on or before the twentieth day of November 1889, and the work completed daily shall be of an average sufficient to complete the entire work within the time specified.

6. All loss or damage arising out of the nature of the work or from action of the elements or from any unforeseen causes, accidents or obstructions or from any difficulty not arising through the fault of the construction company, that may be encountered in the prosecution of the work shall be borne by the contractor without extra charge to the construction company.

7. The construction company shall have the right to require of the contractors proof of the payment of all debts owing by the contractors or any subcontractors for work performed or materials supplied in the performance of this contract, or any part thereof and may withhold payment hereunder until such proof satisfactory to the construction company shall be furnished. The con-
18 struction company may at any time pay to the laborers employed by the contractor or to others having preferred claims under the laws of this State so much of the money due to the con-

tractors as may be due said laborers or others and charge the same to the contractors.

8. The construction company shall have the right to direct the use of any kind of pipe that they may deem necessary for the crossing of streams and rivers and the manner of laying and securing the same.

9. The contractors shall give a bond with sufficient sureties to be approved by the construction company, conditioned for the faithful performance of this contract.

10. The time in which this contract is to be performed and the work completed is of the essence of this contract, and no alteration or extension shall be made unless the same is in writing properly signed by the parties hereto.

11. In case of failure to prosecute the work under this agreement the construction company may upon giving two days' notice in writing to the contractors, if they shall be found upon the work and if not by posting the same in a conspicuous place near the work or by notifying any foreman or laborers upon said work in writing of the said construction company's intention to take possession of said work said construction company may take possession in such case of said work and relet the same or complete the same itself at the cost and expense of said contractors.

12. After the 20th of November 1889 said contractors shall pay to said construction company the sum of five hundred dollars ($500) per day for each and every day that the work remains uncom-
19 pleted under this contract, in addition to the penalty named in said bond.

13. Said construction company shall not be liable by reason of any delay caused by interruption in obtaining the right of way, but the time lost in obtaining said right of way shall not be included in the period specified for the performance of this contract, but an equal period of time shall be allowed the contractors in which to perform said contract.

Specifications.

The main line which is to be laid according to the specifications and contract, will be from a point near La Salle on the L. S. & M. S. railroad, running thence north on or near said railroad right of way to a point where the La Pleasant pike crosses said railroad one-half mile south of the south line of the city of Monroe, thence along said pike to the intersection with Navarre St. just outside of the city limits, thence along Navarre St. to the Raison river, and across said river through the Meloche lots so as to cross Elm St. at the west line of the Reynolds property, thence north along the west line of Reynolds farm to a stake, thence easterly to a point on the north line of said farm within about ten feet of the corner of said farm; thence northeasterly through the Spaulding farm to a point on the north line of the same, thence in a northeasterly direction till it intersects with the L. S. & M. S. right of way near Sandy creek; thence along the west side of said railroad, diverging at points where it may be

necessary to a point known as Wabash crossing, thence continuing north to the crossing of the Lake Shore road over Fort street, thence easterly along Fort St. to the westerly line of Detroit.

20 There will be furnished for laying, 18 miles more or less of second-hand 12-inch D. pipe, converse joints, with bells *d*urned off or on as the case may be, fourteen miles more or less of 14-inch wrought-iron pipe with converse joints new, and ten miles more or less of 16-inch wrought-iron pipe converse joints. The construction company to have the option of including or not in this contract the 16-inch pipe to be laid within the city limits.

Said lines shall be located substantially as specified in the foregoing description but reserving to the company the right to make what changes may be found necessary to conform with the requirements of the right of way at different points along the route, but, not so as to materially change the nature of the work as contemplated in this contract.

The work herein contracted for shall include the proper setting and connecting of all necessary special castings; all gate valves and all other fittings, at such places and in such manner as may be required by this contract or as directed by the manager of the company or his representatives.

The company will furnish and distribute all pipe fittings such as valves, material for valve boxes, blow-offs, drips, tees and other special castings, lead and blocking on the line of right of way, where it is possible, and at the river creek, road and railroad crossings, they will place them on the sides or banks thereof.

The t*r*enches for the 12-inch pipe shall not be less than three and one-half feet deep, and not less than 18 inches — at the bottom. The trenches for the 14-inch pipe shall not be less than four feet two inches deep and not less than twenty (20) inches wide at the bottom.

And the trenches for the 16-inch pipe shall not be less than
21 four and one third feet deep and not less than twenty-two inches wide at the bottom.

Trenches must be straight in alignment with true and even grades, and so constructed, that the pipe will rest evenly and squarely on the blocking, at such points where the variation of the ground requires the trench shall be dug to such depth as the manager or his representative may direct without additional cost.

After trenches are once opened by the contractor they shall be kept open at his expense, and free and clear from obstruction until the pipe is laid and the trenches ready to be filled in and the company shall not be liable by reason of caving in of the trenches or for any other accident to or obstruction of the same. Proper measures must always be taken by the contractors to insure safety to persons and property, while the trenches are open, whether the same are upon a public highway or on private property, over which the company has a right of way; and all precautions such as shoreing bridging, barricading, boxing, watching lighting &c., shall be done by the contractor at his own expense, so long as there is any danger appertaining to the work, and the contractor will be held responsi-

ble for all damage resulting from negligence or breach of contract in this regard.

Laying pipe.

The pipe shall be laid in a first-class manner in every respect. Before running lead the pipes and joints must be carefully wiped out to make them clean and dry. Every joint shall be thoroughly locked and the joint run with but one pouring of lead, and any joint not properly made must be melted out and run again until a perfect joint is obtained. Each length of pipe to be properly
22 blocked in at least three places or more if the superintendent so directs, with the blocks furnished by the company, also the denters to be properly filled and tamped before caulking, the joints to be thoroughly calked in a good and workmanlike manner, and must stand a gas or air pressure of three hundred pounds to the square inch, said test to be made in the presence of the manager or his representative and at the expense of the contractor, and no joints shall be covered without written permission until they are pronounced satisfactory by said manager or engineer and the ends of pipe fittings must be securely plugged up before quitting work at midnight to prevent anything being put in the line that might cause trouble.

In streets alleys, sidewalks and roads the class of surface before existing shall be replaced so as to be in every way equal to the surface in material and workmanship and satisfactory to the manager or his representative.

The contractor will be held responsible for any loss or damage to public or private property due to direlection in this regard.

In crossing private property back-filling must be done in inverse order of removal, the soil being placed on top and the whole done in a workmanlike manner.

All trenches must be filled in as soon as possible after pipe is laid and accepted.

All highways must be left free and unobstructed for public travel, all ditches must be bridged immediately after opening, the trench at all points where bridges are necessary, red lights as danger signals shall be kept at points not more — two hundred feet apart on all open trenches along roads and other places of danger, and placed by sunset and not removed till after sunrise.

23 All fences taken down damaged or destroyed by the second party shall be replaced in as good condition as they were found: and all damages done by the laying of the pipe not covered by the company's right of way shall be paid for by the second party.

The contractor shall have no claim upon the company for any delay in the delivery of pipe fixtures and fittings; but in case he is delayed (by reason of the non-delivery) he shall be entitled to a like extension of time for completion of his contract.

All pipe-lead fittings, blockings &c. shall be at the contractor's risk after being placed by the company on its right of way; but no lead or blocks shall be strung faster than the contractor wishes it pro-

vided the company shall not be held liable for any delay caused by the non-delivery of such.

The price paid for pipe-laying shall include all road, railroad creek and river crossings except blasting and opening the crossings of Raison river, in the city of Monroe, which ditch shall be opened by and at the expense of the first party.

Rock.

All material not furnished by the first party necessary to the laying of said pipe the setting of valves, valve boxes, blow-offs, drips, tees, and other fittings ans special castings, and all other things necessary and proper to be done in the performance and completion of the work herein contracted for shall be furnished by said party of the second part.

Final test.

A final test will be made within fifteen days after the contractor has notified the company in writing of the completion of the
24 work and the final estimate shall not be paid to the contractor until such test is made, and is satisfactory to the company.

It is understood that in the event of an extraordinary storm during which the work cannot be prosecuted, or in the judgment of the construction company pipe should not be laid, said contractors are to have the benefit of the suspension of the work by an equal extension of time within which the work shall be completed.

When rock is found which requires blasting in order to sink the trench to the specified depth, in lieu of the contract price compensation shall be paid to the contractors as follows:

For all work when the trench is sunk entirely through rock one dollar per lineal yard. When the trench is sunk partly through rock and partly through earth the contractors shall be paid a price therefor ascertained in the following manner:

The contractors shall choose one person and the construction company another, and said persons shall determine what shall be a fair and just compensation for such work and said construction company shall pay the sa*id* to said contractors.

25 EXHIBIT "B."

Know all men by these presents that we, J. C. Gibney & Co., as principals, and J. B. McElwaine and J. B. Wheeler, as sureties, are held and firmly bound unto the Interior Construction and Improvement Co. of New York City in the sum of twenty thousand dollars ($20,000), to be paid to the said company or to its certain attorney, its successors or assigns; for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Dated the 26th day of October, in the year one thousand eight hundred and eighty-nine.

Whereas the said J. C. Gibney & Co. has entered into a contract with the said Interior Construction and Improvement Company to lay certain natural gas pipe line in the State of Michigan, bearing date the 10th day of October, A. D. 1889:

Now, the condition of this obligation is such that if the said J. C. Gibney & Co. shall well and truly keep and perform all the terms and conditions of said contract on their part to be kept and performed, and shall indemnify and save harmless the said Interior Construction and Improvement Company as therein stipulated, then this obligation shall be of no effect; otherwise it shall remain in full force and virtue.

(Signed) J. C. GIBNEY & CO., *Contractors.*
J. B. McELWAINE. [L. S.]
J. B. WHEELER. [L. S.]

In witness of—
JOHN R. WATT.

26 EXHIBIT "C."

The Interior Const'n & Improvement Co.

Analysis of Debits. Acc. J. C. Gibney & Co.

Salaries.

A. E. Riopelle.....Voucher No. 840..	827 73		
J. Lee, foreman..... " 827..	42 17		
M. Raupp, arbitrator.... " 868..	5 63		
T. Barry, time-keeper.... " 690..	28 00		
Do. do. .... " 829..	28 00		
Do. do. .... " 854..	18 02		
Do. do. .... " 872..	16 00		
Do. do. .... " 906..	18 90		
		8184 45	

Material, &c.

John Strong & Son.....Voucher No. 391..	825 06		
W. H. Anderson & Son.. " 381..	211 44		
A. C. McGraw & Co..... " 523..	302 54		
Saliotte & Raupp..... " 457..	11 29		
		550 33	

Use of tug.

J. & T. Hurley.....Voucher No. 633..	.....	127 00	

Moving lighter, &c.

Jas. Cobnau.....Voucher No. 542..	820 00		
Thos. Murphy, "rent of lighter"..... " 793..	402 00		
		422 00	

Transportation of caulkers.

National Transit Co.....	Voucher No.	383..	$140 75	
P. Flannigan.....	"	410..	63 00	
				203 75

Expenses of foremen, &c.

W. Dygert.....	Voucher No.	571..	83 00	
Zack Kellerman.....	"	572..	9 07	
W. Herbert.....	"	646..	5 76	
J. E. Lee.....	"	734..	44 48	
P. Flannigan.....	"	409..	432 01	
				494 32

Miscellaneous.

Detroit Omnibus line....	Voucher No.	538..	86 00	
J. Thompson & Bro....	"	426..	70	
				6 70
	Forward..	.....		$1,988 55
27	Forward.....			$1,988 55

Cash advanced.

Am't on acc't of contract..	Voucher No.	134..	$7,500 00	
Do. do. ..	"	244..	10,000 00	
Do. do. ..	"	245..	4,500 00	
Do. do. ..	"	246..	7,700 00	
Note made by J. C. Gibney & Co. to order of John Byrne.....			3,500 00	
Cash advanced to J. C. McGibney & Co. by J. V. Campbell, Jr., and accepted by I. C. & I. Co.....			1,500 00	
Cash paid on time certificates of J. C. McGibney & Co.....			571 50	
				35,271 50

Special labor.

C. F. Sloan.....	Voucher No.	799..	$10 75	
G. Mathias.....	"	809..	6 75	
				17 50

Damage claims.

Geo. Heck.....	Voucher No.	799..	$7 00
G. Cousino...	"	800..	2 60
A. Stoir.....	"	801..	7 80
Jos. Wilhelm.....	"	802..	4 90
E. H. Reynolds.....	"	803..	30 00
Ant. Labadie.....	"	812..	2 50
M. A. Lathrop.....	"	833..	9 00
C. Schently.....	"	842..	4 50
H'y Matterson.....	"	846..	6 25
Ant. Nadeau.....	"	844..	18 00

Wm. Matterson	"	843..	5 00	
Peter Cousino	"	847..	8 50	
P. Labadie	"	710..	5 00	
First National bank	"	504..	23 25	
C. Morris	"	716..	2 00	
J. Eberts	"	719..	5 53	
G. S. Miller	"	731..	3 00	
Abdrew Miller	"	732..	5 60	
J. F. Wood	"	795..	6 55	
John Eberts	"	796..	5 00	
Alex. Mater	"	797..	4 00	
E. Cousino	"	848..	7 85	
			173 83	
Forward				$37,277 55
28 Forward				$37,277 55
John Nadeau	Voucher No.	849..	7 00	
August Baumey	"	856..	2 50	
Reb. J. Clark	"	861..	2 00	
Abram Le Blanc	"	863..	5 00	
Aug. Turski	"	869..	3 25	
Leander Fix	"	931..	4 50	
J. Ranch	"	882..	3 00	
Simon Knabb	"	687..	22 80	
C. Ludman	"	689..	2 00	
W. F. Knapp	"	883..	8 25	
Fred. Tank	"	700..	2 00	
Hy Groh	"	781..	4 00	
Aug. Torranno	"	828..	2 00	
Proportion of claims allowed by A. E. Riopelle, claim ag't, and still unpaid			93 89	
				336 02
Account expended for labor, as per detailed ledger account herewith				20,605 56
L. S. & M. S. R'y train service.				
Proportion due by J. C. McGibney & Co., as per bill rendered to him by I. C. & I. Co.				13,721 01
Default in contract from Nov. 21st, 1889, to Jan'y 23rd, 1890, viz. (both inclusive):				
10 days in Nov., 1889;				
30 " Dec., 1889;				
23 " Jan., 1890;				
Total, 63 days at $500.00 per day, as per contract				31,500 00
Total				$103,440 14

29 *Copy of Ledger Account—J. C. Gibney & Co.*

			Folio of journal.	
1889.				
Dec.	21	To cash	4	$1,500 00
"	24	" roll	4	4,000 00
1890.				
Jan.	3	" do	8	2,109 72
"	14	" do		402 92
1889.		No.		
Dec.	31	" v'r 134	11	7,500 00
"	"	" " 243	11	3,500 00
"	"	" " 244	11	10,000 00
"	"	" " 245	11	4,500 00
"	"	" " 246	11	7,700 00
"	"	" " 381	11	211 44
"	"	" " 383	11	140 75
"	"	" " 391	11	25 00
"	"	" " 469-70	11	465 01
"	"	" " 426	11	70
"	"	" " 457	11	11 25
"	"	Bal. of rolls	14	518 87
"	"	O'Leary's rolls	18	4 50
"	"	F. Reed's "	18	15 00
"	"	McLaughlin's rolls	18	105 38
"	"	Roll No. 26		1,365 38
"	"	" No. 24	19	1,317 73
1890.				
Jan.	18	Cald T. c'ks	21	208 67
"	20	To roll No. 34	22	142 80
"	"	do. do. 28	22	4,758 03
"	"	T. c'ks	23	218 13
"	24	To roll No. 36	24	1,884 10
"	"	T. c'ks	24	31 50
"	25	do.	25	74 65
"	28	do.	26	37 25
"	27	do.	27	54 50
"	"	do.	27	21 75
"	"	do.	28	53 50
"	"	do.	28	51 00
"	"	do.	28	360 00
"	"	do.	28	244 00
Feb.	1	Pay-roll	30	641 15
"	"	T. c'ks	30	24 00
"	"	do.	30	48 60
"	"	Pay-roll	30	508 30
"	5	do.	32	139 75
30		Forward		$54,704 43
1890.				
Feb.	7	Forward		$54,704 43
"	"	To T. c'ks	33	94 75
"	6	do.	36	4 50
"	"	Pay-roll	39	162 45
"	8	To T. c'ks	40	13 50
"	12	do.	43	6 75
"	14	Const. M. line	44	467 13
"	19	T. c'ks	48	20 75
"	20	Jan. vouchers	50	507 37
"	"	T. c'ks	50	30 75
"	"	To pay-roll No. 60		95 75
Mar.	1	T. c'ks	59	90 00
"	4	do.	58	28 00
"	8	do.	62	4 50
"	10	Pay-roll No. 64	63	168 60
"	14	do. 65	66	98 55
"	20	Feb. vouchers	69	93 61
"	26	Pay-roll No. 68	74	16 50
"	31	do. 70	78	90 00
Apr.	3	T. c'ks	80	4 50
		do.	81	5 00
		Mar. vouchers to No. 671		700 00
		L. S. & M. S. R'y Co.'s train service		13,721 01
Apr.	11	T. c'ks	85	1 50
"	11	Gen. sal. & ex.	86	40 50
		Pro. of damage claims all'd & unpaid		93 80
		Add March vouchers No. 687, 688, 709, 781, 828, 881, 882, & 906		62 95
		Default in contract, 63 days at $500.00 per day		31,500 00
Apr.	15	Time certf	88	571 50
				$103,440 14

1890.				
Jan.	11	By lost c'k	8	25
Feb.	2	" do.	32	25
		Forward		50
1890.				
Feb.	2	Forward		50
Mar.	7	Unclaimed pay.	61	$62 10
"	11	Ret'd g'ds	65	11 75
		Estimate		40,704 75
		Balance		62,570 79
				$103,440 14

3—381

31 And afterwards, to wit, at the May term of said court, on the 19th day of August, 1891, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Upon motion of the plaintiff, the defendants are ruled to answer herein on or before August 31st.

And afterwards, to wit, at the May term of said court, on the 15th day of September, 1891, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the defendants James B. McElwaine and James B. Wheeler, by H. J. Milligan and Duncan & Smith, their attorneys, and file their plea in abatement herein in the words following, to wit:

The defendants James B. McElwaine and James B. Wheeler aver and show that at the time of the bringing of this action the defendants John C. Gibney and Harvey Bartley were and ever since have been and yet are residents and citizens of the State of Pennsylvania, and that neither of said defendants have at any time since the bringing of this action been either a citizen or resident of the State of Indiana. Wherefore the defendants first above named say that this court has no jurisdiction of this cause, and hence they pray the judgment of this court that this cause be abated, and that they have judgment for their costs.

DUNCAN & SMITH,
H. J. MILLIGAN,
Attorneys for Defendants.

And afterwards, to wit, at the May term of said court, on the 17th day of September, 1891, before Honorable William A. Woods,
32 judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by J. C. Donnelly and W. E. Niblack, its attorneys, and files its demurrer to the answer herein in the words following, to wit:

The plaintiff demurs to the answer of the defendants James B. McElwaine and James B. Wheeler filed herein and for cause of demurrer says that said answer does not contain facts sufficient to constitute a cause for the abatement of this action.

JOHN C. DONNELLY,
WILLIAM E. NIBLACK,
Attorneys for Plaintiff.

And afterwards, to wit, at the May term of said court, on the 8th day of October, 1891, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon

the court, being sufficiently advised in the premises, doth now overrule the demurrer to the answer herein; to which ruling the plaintiff now excepts.

And afterwards, to wit, at the November term of said court, on the 4th day of February, 1892, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties herein, the plaintiff by J. C. Donnelly and W. E. Niblack, its attorneys, and the defendants by H. J. Milligan and Duncan & Smith, their attorneys, and the plaintiff now declines to plead further herein, but elects to stand upon its demurrer
33 to the defendants' answer; whereupon the defendants, by their attorneys, move the court for judgment herein.

It is therefore considered by the court that the plaintiff take nothing by his action herein, and that the defendants recover of the plaintiff their costs and charges herein expended, taxed at $—.

And now the plaintiff prays a writ of error to the Supreme Court of the United States, which is granted upon their filing a bond in the sum of three hundred dollars, with sureties to the approval of the court, and said plaintiff's petition for a writ of error, now filed, is in the words following, to wit:

Your petitioner, the above-named The Interior Construction and Improvement Company, respectfully represents that it is desirous of removing the above-entitled cause to the Supreme Court of the United States for the review of the judgment heretofore rendered therein in favor of the defendants and against the plaintiff, therein holding and deciding that this court has no jurisdiction of said action. The said plaintiff prays allowance of a writ of error, and herewith files an assignment of errors in accordance with rule 35 of the Supreme Court of the United States.

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY,
By JOHN C. DONNELLY, *Its Attorney.*

And said assignment of errors is in the words following, to wit:

And now comes the said plaintiff, by John C. Donnelly, its attorney, and says that in the record and proceedings in this
34 cause there is manifest error, which is assigned as follows, as provided by rule 35 of Supreme Court of the United States:

1. The court erred in overruling the plaintiff's demurrer to defendants' plea in abatement.

2. This court erred in sustaining said plea in abatement and hold that it had no jurisdiction of said cause.

3. This court erred in entering judgment in favor of defendants and against said plaintiff on said plea in abatement and dismissing and quashing the proceedings.

JOHN C. DONNELLY,
Attorney for Plaintiff.
WILLIAM E. NIBLACK,
Of Counsel.

And afterwards, to wit, at the November term of said court, on the 1st day of March, 1892, before Honorable William A. Woods, judge of said court, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by counsel, and files its appeal bond herein in the sum of three hundred dollars, with Simon P. Sheerin as surety thereon, which bond is now by the court approved, and the petition of the plaintiff for a writ of error is hereby granted, and a citation is ordered to issue herein; and said appeal bond is in the words following, to wit:

Know all men by these presents that we, The Interior Construction and Improvement Company and Simon P. Sheerin, are held and firmly bound unto the above-named John C. Gibney and Harvey Bartley, copartners as J. C. Gibney & Company, J. B. McElwaine and J. B. Wheeler, in the sum of three hundred dollars, to be paid to said John C. Gibney and others; to which payment, well and truly to be made, we bind ourselves, jointly, and severally and our
35 and each of our heirs, executors, and administrators, jointly by these presents.

Sealed with our seal and dated this — day of ——, 1892.

Whereas the above-named Interior Construction & Improvement Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above-named Interior Construction & Improvement Company shall prosecute the said writ of error to effect and answer all costs and damages that may be adjudged or awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise in full force.

Sealed and delivered in presence of—

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY,
By JNO. BYRON, *Prest.* [SEAL.]
SIMON P. SHEERIN. [SEAL.]

Taken and approved by me this 1st day of March, 1892.

WM. A. WOODS.

36 UNITED STATES OF AMERICA, }
District of Indiana, } ss:

I, Noble C. Butler, clerk of the circuit court of the United States within and for the district aforesaid, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the cause of The Interior Construction and Improvement Company against John C. Gibney and others, as fully as the same remains upon the records now in my office.

Seal Circuit Court of the United States, District of Indiana.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 23d day of March, A. D. 1892.

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Case No. 15,001. Indiana C. C. U. S. Term No., 381. The Interior Construction and Improvement Company, plaintiff in error, *vs.* John C. Gibney & Harvey Bartley, copartners as J. C. Gibney & Company; J. B. McElwaine & J. B. Wheeler. Filed March 25th, 1892.

Office Supreme Court, U. S.
FILED.
MAY 24 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 381.

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY,
Plaintiff in Error,

vs.

JOHN C. GIBNEY, et al.,
Defendants in Error.

Brief of John C. Donnelly, Counsel for Plaintiff in Error.

DETROIT:
Record Printing Co., Free Press Bldg., Lafayette Ave.
1895.

In the Supreme Court of the United States.

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY,
Plaintiff in Error.

vs.

JAMES B. McELWAINE, et al.,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

This case is as follows:

John C. Gibney & Co., composed of Gibney and one Harvey Bartley, agreed in writing (Exhibit "A," Rec., pp. 8-13), with the Interior Construction and Improvement Company, a New Jersey corporation, plaintiff in error, to construct for it a natural gas pipe line from the Ohio and Michigan State line, near Toledo, to Detroit. As a guarantee for their performance of the work they gave a bond in the penal sum of twenty thousand dollars (Exhibit "B," Rec., pp. 13-14), with defendants McElwaine and Wheeler as sureties. Gibney & Company describe themselves in the contract as of Indianapolis, State of Indiana. The bond was a joint and several one. (Rec., p. 13.) Gibney & Company failed to perform the contract, and the Construction Company brought action on the bond in the United States Court for the District of Indiana, and making the principals and sureties defendants in the suit. The action was commenced by petition in accordance with the practice in Indiana, and the defendants Gibney, McElwaine and

Wheeler duly entered their appearance in the case. (Rec., p. 2.) The defendant Bartley never appeared or made any defense to the action. No plea or other form of defense was ever made by Gibney except that counsel moved on his and the defendants McElwaine and Wheeler behalf for more specific allegations as to wherein contract was not performed. The defendants McElwaine and Wheeler plead to the jurisdiction of the Court, not as to themselves, but claim that the defendants Gibney and Bartley (who do not defend) were not properly sued in that jurisdiction. There is no question as to the petition having the necessary jurisdictional allegation as to the diverse citizenship of the parties (Rec., p. 3), or that plaintiff and all the defendants are citizens and residents of different States; nor is there any question as to the defendants who plead in abatement being citizens and residents of the State of Indiana. The point is this: Two defendants residing in the district where suit is brought and properly sued therein, and who have entered a general appearance in the cause, contend that the Court shall not take jurisdiction of the case, because other defendants, who do not make any objection to the jurisdiction, are not residents of the district.

ARGUMENT.

It has been repeatedly decided by this Court that the act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the Court. It is rather in the nature of a personal exemption in favor of the defendant, and it is one which he may waive. If diverse citizenship exists a defendant may consent to be sued anywhere he pleases.

The right of a defendant to object to being sued in a district where he does not reside is a mere personal privilege, which must be asserted by the party who claims to have been sued in a wrong district. As stated above, the pleadings of the complainant are very explicit in alleging the citizenship and residence of the defendants in the State and District of Indiana, and that of the plaintiff in the State of New Jersey, and a judgment obtained against them without objection would be perfectly valid if service was obtained in the district.

Grassee vs. Palmer, 8 Wheat., 699.
Toland vs. Sprague, 12 Peters, 300-330.
Ex Parte Schollenberger, 96 U. S., 369.
Bank vs. Morgan, 132 U. S., 141-5.
Ry. Co. vs. McBride, 141 U. S., 127.
R. R. Co. vs. Fox, 145 U. S., 594.
Southern Pac. vs. Denton, 146 U. S., 202.
Southern Exp. Co. vs. Todd, 5 U. S. C. C. A., West Pub. Co., 432.

The gist of the above decisions is that the exemption from suit is a personal one to the defendant which he may waive. It would seem to follow that a defendant who is properly sued in a district, being a resident thereof, could not plead in abatement that another defendant was not properly sued therein. This is especially so if the objecting defendant has entered a general appearance in the case as was done by the defendants who plead in abatement.

It is believed that this is the only point in the case, and it is therefore submitted that the judgment of the Court below should be reversed.

JOHN C. DONNELLY,
Counsel for Plaintiff in Error.

160 U.S. 221

Office Supreme Court, U. S.
FILED.
APR 17 1895
JAMES H. McKENNEY,
CLERK.

160-221

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894

Original, No. . . .

Ex Parte

THE KEASBEY & MATTISON COMPANY,
Petitioner.

1. Motion for rule to show cause.
2. Petition for writ of Mandamus.
3. Certified Copy of Record.

JONES & GOVIN,
Attorneys for Petitioner,
No. 45 Cedar Street,
New York.

EDWARD K. JONES,
Of Counsel.

1. Motion for rule to show cause.

Supreme Court of the United States,

OCTOBER TERM, 1894.

Ex Parte
THE KEASBEY & MATTISON COMPANY,
Petitioner.

Original, No.

Motion.

And now, to wit, this 8th day of April, 1895, comes the above-named petitioner and moves this Honorable Court for a rule to be issued to the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, requiring them on a day to be named therein to show cause before this Honorable Court why a writ of mandamus should not be issued pursuant to the statute in such case made and provided, commanding them to take jurisdiction and proceed to hear and determine a certain controversy lately brought and now pending in the said Circuit Court, wherein the above-named petitioner is complainant, and the E. L. Patch Company and others are defendants, and especially to take jurisdiction and proceed to hear and determine the said controversy as between the said complainant and the said the E. L. Patch Company, and also to vacate and set aside an order filed in the said cause on or about the 4th day of April, 1895, whereby the service of a subpœna ad responden-

dum upon the said the E. L. Patch Company was vacated and set aside and adjudged to be null and void for lack of jurisdiction, and also commanding the said Judges thereupon to proceed with and make such order or decree in said cause as if the said order had not been made, and why the said petitioner should not have such other or further order or relief as may be just and proper in the premises.

Dated April 5th, 1895.

JONES & GOVIN,
Attorneys for Petitioner.

EDWARD K. JONES,
Of Counsel.

2. Petition for writ of Mandamus.

(Petition.)

SUPREME COURT OF THE UNITED STATES, 1

October Term, 1894.

Ex Parte
THE KEASBEY & MATTISON COMPANY,
Petitioner.

Original, No. 2

Petition for Writ of Mandamus.

To the Honorable The Supreme Court of the United States: —

The petition of the Keasbey & Mattison Company respectfully shows as follows:

FIRST.—That on the 28th day of January, 1895, your petitioner filed its certain bill on the equity side 3
of the Circuit Court of the United States for the Southern District of New York against the E. L. Patch Company, and also against one Henry E. C. Kuehn and one Edward H. Lubbers, alleging, among other things, that your petitioner is a corporation organized and existing under the laws of the State of Pennsylvania, and that the defendant, the said the E. L. Patch Company, is a corporation other than a monied corporation and having a capital stock and organized and existing under the laws of the State of Massa- 4
chusetts; that the defendants Henry E. C. Kuehn and Edward H. Lubbers are citizens of the United States and of the State of New York, and copartners by the firm name of Kuehn & Lubbers, and carry on busi-

5 ness in the City of New York, in said State, by such firm name; that the said the E. L. Patch Company is also doing business in the said State of New York, and has an office or place of business which is its principal office and place of business in the said State in the said City of New York; that the said defendants Henry E. C. Kuehn and Edward H. Lubbers are the managing or general agents of the said the E. L. Patch Company in the said State, and that their office or place of business is where the said corporation has its
6 said principal place of business in the said State, to wit, in the said City of New York; that in the year 1881 the firm of Keasbey & Mattison, the predecessor of your petitioner, and to all whose rights your petitioner had duly succeeded prior to the commencement of the said suit, produced a certain new medical preparation of Caffeine, to which they applied the arbitrary and fanciful prefix "Bromo" thus making the name "Bromo Caffeine," which they and your petitioner, their successor as aforesaid, con-
7 tinued thereafter to manufacture and sell by the said name; that your petitioner is still making and selling the same; that the same had acquired great celebrity and an extensive sale and is of great value to the said plaintiff; that the said Keasbey & Mattison had in the year 1886 caused the said name "Bromo Caffeine" to be registered in the United States Patent Office under the laws of the United States in such case made and provided; that the said trademark was and is used in commerce with certain
8 and several foreign nations which are particularly named in the said bill; that the defendant the E. L. Patch Company is making at the City of Boston, in the State of Massachusetts, and selling throughout the United States, including the said State and City of New York, an imitation of the said medical peparation of your petitioner, to which it unlawfully applies the said arbitrary term "Bromo,"

and is committing other acts alleged to infringe upon your petitioner's said trademark; that the said Kuehn & Lubbers are also selling the said infringing article in the City of New York and elsewhere in the said State; whereupon your petitioner prays in the said bill for the usual process of subpœna, for an injunction and an accounting, and for general relief in the premises. 9

SECOND.—That upon filing the said bill, to wit, on the 28th day of January, 1895, the usual subpœna ad-respondendum was issued from the Clerk's office of the said Circuit Court, directed to the said defendants, and requiring them to answer the said bill and to enter their appearance in the said cause on the rule day occurring the first Monday of March, 1895; that the said subpœna was subsequently and on the same day duly served by the Marshal of the said Court upon the said the E. L. Patch Company by exhibiting the original and delivering a copy thereof to the said Henry E. C. Kuehn, one of the managing agents of the said company in the said District, and also served upon the said defendants Henry E. C. Kuehn and Edward H. Lubbers by exhibiting the original and delivering a copy thereof to each of them. 10 11

THIRD.—That on or about the 4th day of March, 1895, the said defendant the E. L. Patch Company by its solicitor entered a special appearance in the said cause for the purpose of moving to set aside the service of the said subpœna and for the purpose of filing a plea in abatement and to the jurisdiction of the Court; that on or about the 15th day of March, 1895, a motion was made in the said cause in behalf of the said E. L. Patch Company to set aside the said service upon the said company, which motion was duly heard by the Honorable E. Henry Lacombe, one of the Judges of the said Court, who subsequently, on or about the 4th day of April, 1895, caused an order 12

to be entered in the said cause granting the said motion and vacating and setting aside the said service upon the said the E. L. Patch Company and declaring the same null and void and absolutely discharging the said Company from further proceedings in the said cause on the ground that the said Court did not have jurisdiction of the said defendant the E. L. Patch Company.

FOURTH.—That your petitioner annexes hereunto and makes a part of this its petition copies of the said bill of complaint and all other proceedings as they appear of record in the said cause above mentioned, duly certified by the Clerk of the said Court.

FIFTH.—And your petitioner further shows that jurisdiction over the said controversy, which is one depending upon subject matter, is expressly and particularly conferred upon the Courts of the United States by an Act of Congress, approved March 3d, 1881, entitled "An Act to authorize the registration of trademarks and protect the same" (21 Stats. at Large, 502), which, among other things, in terms provides (Sec. 7) that the "Courts of the United States shall have original and appellate jurisdiction of such cases without regard to the amount in controversy," and that the jurisdiction of the said Circuit Court invoked by the said cause is, therefore, not "founded only on the fact that the action is between citizens of different States," nor is it subject to any of the provisions of the subsequent Act of March 3, 1887, as amended by the Act of Aug. 13, 1888, and relating to the general jurisdiction of the Circuit Courts (25 Stat. L., 433); and yet your petitioner avers that the said Circuit Court, in making the said order setting aside the service of the said subpœna as to the defendant the E. L. Patch Company because of assumed want of jurisdiction did so upon the erroneous assumption that the provisions of the first section

of the said subsequent Act of March 3, 1887, as 17
amended by the Act of August 13, 1888, to the effect that the Circuit Courts shall only have jurisdiction in cases where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and that no civil suit shall be brought before such Circuit Courts against any person in any other district than that whereof he is an inhabitant, except where the jurisdiction is founded only on the fact that the action is between citizens of different States, in which case suit shall be brought only in the 18
district of the residence of the plaintiff or defendant, were applicable to the said suit of your petitioner, and based its action in declining jurisdiction of the said defendant the E. L. Patch Company, on the authority, among others, of the decision of this Court in the cases of Shaw *v.* Quincy Mining Co., (145 U. S., 444), and Empire Coal Co. *v.* Empire Mining Co. (150 U. S., 159), and wholly disregarded the decision of this Court in the case of *In re* Hohorst (150 U. S., 653), where it was held, among other 19
things (p. 661), that "the grant to the Circuit Courts "in this section (Section 1 of the Act of March 3, "1887, as corrected by the Act of Aug. 8, 1888, 25 Stat. "L., 433, *supra*), of jurisdiction over a class of cases described generally as 'arising under the laws of the "United States,' *does not affect the jurisdiction granted "by earlier statutes to any Court of the United States "over specified cases of that class,*" and also wholly disregarded the further decision of this Court in the same case (pp. 662, 663), to the effect that in such case 20
service might be lawfully made upon the agent of a corporation doing business in the district where the suit was brought.

SIXTH.—And your petitioner further shows that the laws of the State of New York in which the said suit of your petitioner was commenced provide that every

corporation organized and existing under the laws of another State, as a prerequisite and condition to their right to do business in said State, shall, among other things, designate a person upon whom service of process in all civil actions may be made, and that the Code of Civil Procedure of that State also provides that service upon the general or managing agent of any non-resident corporation shall be a good and valid service, and that this Honorable Court in the afore-mentioned case of *In re* Hohorst (p. 663), applied the said provision of the New York Code of Civil Procedure and held that service of process upon a non-resident corporation in accordance with it was a good and valid service of process in a Circuit Court of the United States sitting in that State.

Your petitioner alleges and respectfully submits, upon the foregoing facts, that the said order of the said Circuit Court of United States for the Southern District of New York vacating and setting aside the service of the said subpœna against the said the E. L. Patch Company and declaring the same null and void and discharging the said defendant from further attendance in the said cause was wrongful and wholly without authority or warrant in law, and your petitioner, therefore, prays that this Honorable Court may issue its writ of mandamus to the said Honorable the Judges of the said Circuit Court of the United States for the Southern District of New York, commanding them to vacate and set aside the aforesaid order vacating and setting aside the service of the said subpœna upon the said the E. L. Patch Company, and discharging it from further attendance in the said cause, and also commanding the said Judges to take jurisdiction of the said cause and of the said defendant the E. L. Patch Company, and proceed to hear and finally determine upon the merits the

several matters set forth in the said bill, and otherwise take jurisdiction of the same as if the said order vacating the said service had not been made, and that your petitioner may have such other or further order or relief in the premises as may appear to be just and proper. 25

And your petitioner, as in duty bound, will ever pray, etc.

THE KEASBEY & MATTISON COMPANY, 26

By JONES & GOVIN,
Attorneys.

EDWARD K. JONES,
Of Counsel.

27

28

29

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

EDWARD K. JONES, being duly sworn, deposes and says: I am one of the solicitors and counsel for the Keasbey & Mattison Company. I was such solicitor and counsel in all of the proceedings set forth in the foregoing petition, and have personal knowledge thereof. I have read the foregoing petition and know its contents and the same is true to my knowledge, information and belief. The matters therein stated are furthermore substantiated by the certified copy of the record annexed to said petition.

30

The reason why this petition is not verified by the complainant is that I am personally familiar with all of the proceedings taken in said cause, as the solicitor and counsel for the complainant, and the complainant is not familiar with the various proceedings taken by its solicitors on its behalf.

31

EDWARD K. JONES.

Sworn to and subscribed before me, this 5th day of April, 1895.

FREDERICK KOPF,
[SEAL.] Notary Public (50), N. Y. Co.

32

3. Certified Copy of Record.

(Subpoena.)

THE PRESIDENT OF THE UNITED STATES OF AMERICA, 1

To The E. L. Patch Company, Henry E. C. Kuehn [L. S.] and Edward H. Lubbers,

Greeting:

You are hereby commanded that you and each of you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on the first Monday of March, A. D. 1895, 2 wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by The Keasbey & Mattison Company, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars.

Witness, Honorable Melville W. Fuller, Chief Justice of the United States, at the City of New York, on the 28th day of January, in the year of our Lord 3 one thousand eight hundred and ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

JOHN A. SHIELDS,
Clerk.

JONES & GOVIN,
Solicitors for Complainant.

The defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on 4 or before the first Monday of March, 1895, or the bill will be taken *pro confesso* against them.

J. A. S.,
Clerk.

5

(Marshal's Return.)

I hereby certify, that on the 28th day of January, 1895, at the City of New York, in my District, I served the within subpœna in Equity upon the within named Henry E. C. Kuehn and Edward H. Lubbers by exhibiting to each of them the within original, and at the same time leaving with each of them a copy thereof.

6 I hereby certify, that on the 28th day of January, 1895, at the City of New York, in my District, I served the within subpœna in Equity upon the within named The E. L. Patch Company, by exhibiting the original to and at the same time leaving a copy thereof with the defendant Henry E. C. Kuehn as managing agent of the said The E. L. Patch Company.

Dated, March 7, 1895.

JOHN H. McCARTY,
United States Marshal,
7 Southern District of New York.

8

9

(Bill of Complaint.)

Circuit Court of the United States,

SOUTHERN DISTRICT OF NEW YORK.

10

THE KEASBEY & MATTISON COMPANY, Complainant, AGAINST THE E. L. PATCH COMPANY, HENRY E. C. KUEHN and EDWARD H. LUBBERS, Defendants.	In Equity.

11

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, sitting in equity:

The above-named complainant the Keasbey & Mattison Company, a corporation organized and existing under the laws of the State of Pennsylvania, brings this its bill of complaint against the E. L. Patch Company, Henry E. C. Kuehn and Edward H. Lubbers, and thereupon your orator alleges and complains as follows: 12

FIRST.—That your said orator the Keasbey & Mattison Company, is a corporation duly organized and existing under the laws of the State of Pennsylvania, and, therefore, in contemplation of law, a citizen of the said State, having its principal office in the borough of Ambler, in the County of Montgomery, in said State.

13 SECOND.—That the defendant the E. L. Patch Company is, as your orator is informed and believes, a corporation other than a monied corporation and having a capital stock, and that it is organized and existing under the laws of the State of Massachusetts; that the defendants Henry E. C. Kuehn and Edward H. Lubbers are, as your orator is informed and believes, citizens of the United States and of the State of New York, and are copartners by the firm name of Kuehn & Lubbers, and that they carry on business in the said
14 City of New York by such firm name; that the said E. L. Patch Company is also doing business in the said State of New York, and has an office or place of business, which is its principal office or place of business in the said State, in the said City of New York; and that the said defendants Henry E. C. Kuehn and Edward H. Lubbers are the managing or general agents of the said E. L. Patch Company in the said State, and that their office or place of business is where the said corporation has its said principal place of business in
15 the said State as aforesaid, to wit, in the said City of New York.

THIRD.—That this is a suit of a civil nature in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the laws of the United States, and also in which there is a controversy between citizens of different States, within the intent and meaning of the Statute in such case made and provided.

16 FOURTH.—And your orator further shows that your orator is engaged in the business or industry of manufacturing chemicals and pharmaceutical and medical preparations, and that its predecessor in the said business or industry was the copartnership firm of Keasbey & Mattison, composed of one Henry G. Keasbey and one Richard V. Mattison, to all whose rights in the said copartnership and business your orator has since

duly succeeded and is now lawfully possessed, as here- 17
inafter more fully set forth.

FIFTH.—And your orator further shows that for many years prior to your orator's succession to the business and rights of the aforesaid firm of Keasbey & Mattison, they, the said Keasbey & Mattison, were also engaged in the business or industry of manufacturing chemicals and pharmaceutical and medical preparations, first in the City of Philadelphia, in the said State of Pennsylvania, and afterwards a short dis- 18
tance outside the said city in the said borough of Ambler, where your orator now has its works and laboratories, and that in the year 1873 the said Keasbey & Mattison turned their attention to the manufacture of what have since become known as Effervescent Salts, and especially to such as were found to possess the medicinal quality of relieving the human system of those temporary disorders caused by overexertion, mental excitement, indulgence in alcoholic excesses, irregular diet and other causes resulting in 19
the disturbance of the head, stomach and kidneys; that the said Keasbey & Mattison were, in fact, the prime movers in that industry in the United States; and your orator alleges that the said firm of Keasbey & Mattison, in carrying out their efforts in this branch of industry and research, have produced many medical preparations of great merit and efficacy.

SIXTH.—And your orator further alleges that in the said year 1873, the said firm of Keasbey & Mattison 20
began experiments to definitely ascertain and apply the therapeutic qualities of Caffeine to the class of disorders above referred to, and especially for the relief of nervous headaches and like ailments; that up to the said period such disorders were usually treated by means of nauseating drugs acting chiefly upon the stomach and bowels, which drugs were distressing in their action and produced subsequent

disorders of the digestive tract; that by the introduction of Caffeine in the form of an effervescing salt, the said Keasbey & Mattison successfully established in general use a new system of medication for such disorders, through which, by means of the rapid diffusion of Caffeine in an effervescing form, a stimulating action upon the nervous system and digestive organs was produced, resulting in almost immediate relief, and at the same time avoiding the undesirable after-effects common under the old practice; that the said Keasbey & Mattison, in prosecuting their said experiments and developing the aforesaid new system of medication, first made a preparation of Caffeine to be administered in an effervescent form to which they gave the name of "Effervescent Citrate of Caffeine," and that many thousands of bottles of this article were sent to and otherwise placed in the hands of physicians throughout the United States between the years 1874 and 1879, and that the said Richard V. Mattison, one of the said firm of Keasbey & Mattison, and a graduated and licensed physician himself, traveled through many of the States of the Union interviewing and soliciting the attention of physicians to the qualities and advantages of their new preparation; and your orator alleges that the same was received with great favor by the medical profession, and rapidly came into use as a physician's prescription, and as a druggist's article, and also as a household remedy.

SEVENTH.—And your orator further alleges that the said Keasbey & Mattison, encouraged by their success in the line of experiment and research last above stated, and by the favor with which their said preparation called "Effervescent Citrate of Caffeine" was received by the medical profession and the general public, and the large and extensive sale of the same throughout the United States, continued their efforts in further extending and developing the

use of Caffeine for the purposes above stated, and that they subsequently produced another and improved preparation which they called "Granular Effervescent Citrate of Caffeine with Pepsin," which was also received with great favor by the medical profession, and that the same was also adopted by them as a physician's prescription, and also soon became popular as a druggist's article and as a household remedy for the class of disorders above mentioned; and that the said two preparations, "Effervescent Citrate of Caffeine" and "Granular Effervescent Citrate of Caffeine with Pepsin," were both extensively sold and widely consumed throughout the United States.

EIGHTH.—And your orator further alleges that afterwards, to wit, in the year 1881, the said Keasbey & Mattison produced still another preparation designed to embody the merits of both the preparations last above mentioned and intended at the same time as a further extension and development of the use of Caffeine for the purposes aforesaid, and which, in fact, afterwards practically superseded them both, although the same continued to be manufactured and sold by the said Keasbey & Mattison, and are still made and sold by your orator, their successor as aforesaid.

NINTH. — And your orator further alleges that, though the formula for making all the said preparations was a secret with the said Keasbey & Mattison, and remained such with them until the succession of your orator to their business, and is still a secret with your orator, yet prior to making their new and last preparation above mentioned, as well as subsequently thereto, the said Keasbey & Mattison were, nevertheless, subjected to great injury and damage in the sale of their said respective articles called "Effervescent Citrate of Caffeine" and "Granular Effervescent Citrate of Caffeine with Pepsin" by imitations or counterfeits of the same made and sold by other manu-

29 facturers, and, therefore, before applying a name to their said new preparation they advisedwith counsel as to the law in such cases, and in pursuance of such advice they devised the arbitrary and fanciful term "Bromo," which had never been previously used in medicine, and which especially had never been used to designate any medicine of the class or character of their said new preparation, and which was, therefore, new, arbitrary and fanciful for the purpose intended, and the said Keasbey & Mattison thereupon, in the said
30 year 1881, adopted the said term "Bromo" as a trademark for their said new preparation, and thereafter called the same "Bromo Caffeine."

TENTH.—And your orator further alleges that on or about the 26th day of June, 1883, after making due application therefor, the said Keasbey & Mattison caused the label used upon the bottles of their said preparation called "Bromo Caffeine," and having the said name printed thereon, together with certain de-
31 scriptive, explanatory and other matter, and directions for use, to be registered in the United States Patent Office at Washington, pursuant to the laws of the United States in such case made and provided, and that they received a certificate thereof, bearing the aforesaid date, to which said certificate your orator prays leave to refer as a part of this its said bill of complaint, and which your orator is at all times ready to produce and exhibit before this Honorable Court as the exigencies of the present cause may re-
32 quire; and that the said Keasbey & Mattison subsequently made application for the registration of the said name "Bromo Caffeine" in the said United States Patent Office as a trademark, which application was afterwards granted, and, thereupon, to wit, on or about the 14th day of December, 1886, the said trademark was duly registered according to law, and a certificate thereof signed by the Commissioner of

Patents, and sealed with the seal of the Department of 33
the Interior, was duly issued and delivered to the said Keasbey & Mattison, to which said certificate your orator also prays leave to refer as a part of this its said bill of complaint, and which your orator is also at all times ready and willing to produce before this Honorable Court as the exigencies of this cause may require.

ELEVENTH.—And your orator further alleges that from and after its introduction into use as aforesaid 34
the said article called "Bromo Caffeine" grew rapidly in the favor of physicians as a specific for the relief of nervous headaches resulting from overtaxed mental energy or excitement, acute attacks of indigestion, the depression following alcoholic excesses, the supersensitiveness of chloral, morphia and opium habitues, and with women for the relief of the headache and backache of neurasthenia, hysteria, dysmenorrhoea and kindred disorders, and that the new method of medication sought as aforesaid by the said 35
Keasbey & Mattison to be developed and perfected by the use of Caffeine for the above-mentioned disorders was highly successful, and that "Bromo Caffeine" thus came into extensive and almost universal use by physicians, and that this use by physicians caused it to be extended into sale and consumption as a druggist's article and as a general household remedy for the above-mentioned ailments, and that the same still is largely used by physicians and dealt in and sold by druggists and others through- 36
out the United States, and is now and for many years has been also sold and shipped to and extensively used in foreign countries, including the West India Islands, Mexico, the Central American and South American States, Great Britain, the States on the Continent of Europe, in Egypt and in India, and that the said trade-mark for the same is, therefore, used in

commerce between the several States and between the United States and foreign nations within the intent and meaning of the statute in such case made and provided; that the said Keasbey & Mattison expended great efforts and large sums of money in thus introducing the said article into use, and that they consequently derived, and your orator as their successor still derives, large profits from the sale and consumption of the said medicine; and that until the facts hereinafter stated the right of the said Keasbey & Mattison, and your orator as their successor, to the exclusive use of the said trade-mark "Bromo Caffeine," and to the prefix "Bromo," was universally respected and acquiesced in by other manufacturers and by the public generally, so that the same was of great value, and, but for the infringements hereinafter set forth and complained of, would still be of unimpaired value to your orator in the manufacture and sale of the said article.

TWELFTH.—And your orator further alleges that such was the success and reputation of the said medicine both as a physician's prescription and as a druggist's article, and also as a household remedy, that the term "Bromo Caffeine," and the said prefix "Bromo"—(which your orator alleges has become the general diminutive or short expression for the full name "Bromo Caffeine")—became synonymous in the public mind with "Headache Cure," and that the aforesaid universal respect and acquiescence of other manufacturers and the public generally to the exclusive right of the said Keasbey & Mattison to the said trade-mark "Bromo Caffeine" and the prefix or diminutive "Bromo" continued uninterruptedly for many years and until the reputation and success of the said medicine to which it was applied as aforesaid became such that certain evil-minded and dishonest persons manufacturing imitations of the said medicine,

not being satisfied with selling the same by names 41
properly distinguishing them from the article manufactured and sold by the said Keasbey & Mattison, attempted various devices to infringe upon the said trademark, and for that purpose made use, among other things, of the names "Bromide Caffeine," "Caffeine Bromide," and other equivalent names in sound to the said trademark of the said Keasbey & Mattison, and that a certain alleged corporation called the Brooklyn Chemical Works, one of the said infringers, upon being proceeded against by the said 42
Keasbey & Mattison,—(and whose President testified on the trial of the case that he did so because he thought he "might as well be hung for a sheep as a lamb"—), openly and boldly copied the said trademark *in totidem verbis*, that is to say, used the name "Bromo Caffeine" literally and in full; that the said Keasbey & Mattison, as soon as they discovered the said infringements, applied to one of the Police Justices of the City of New York for warrants for the apprehension and arrest of the said infringers under 43
the provisions of the Penal Code of the State of New York relating to trademarks, and that they were accordingly arrested, and after a preliminary hearing held for further action and trial; that the said proceedings gave rise to great interest and concern among other manufacturers of and dealers in imitations of the said medicine, all of whom were desirous that the said Keasbey & Mattison should fail in vindicating their rights to the said trademark in the courts, in order that they, the said imitators, might 44
thereby further trench upon the business of the said Keasbey & Mattison in the manufacture and sale of the said medicine by infringing upon the said trademark, so that by a tacit general consent or understanding one of the said cases was selected for trial as a test case; that the said test case was brought before the Court of Special Sessions of the City and County of

New York, and is known as the case of the *People* v. *Luzon J. Finch*, who manufactured and sold an article similar to the said medicine made and sold by the said Keasbey & Mattison, and which he labeled and sold by the name "Bromide Caffeine;" that the hearing of the said case came on before the said Court on the 12th day of June, 1890, and on that and subsequent days was tried before the Judges thereof by the examination and cross-examination of a large number of witnesses both for the prosecution and for the defendant, who was represented by counsel and attended and assisted by a number of other counsel representing other manufacturers making and selling imitations of the said medicine, the latter of whom, as aforesaid, were hostile and opposed to the rights of the said Keasbey & Mattison to the exclusive use and enjoyment of the said trademark; that after the said case had been fully tried and argued by a number of counsel and a full hearing granted to all opposing interests concerned, as well as to the defendant and counsel acting for him, the Court delivered its judgment finding the said defendant "guilty," and convicting and sentencing him to pay a fine of $500 and to stand imprisoned until it was paid; that the result of the said trial and conviction was the general disappearance from the market of all such infringements, except in the above-mentioned case against the so-called Brooklyn Chemical Works, which, and whose officers, persisting in their defense, were subsequently indicted by the Grand Jury of the City and County of New York for using both the name "Bromide Caffeine," and also "Bromo Caffeine," as above stated, upon an article made and sold by them in imitation of the said medicine of the plaintiff, and it having been made a question in the said cases as to the exclusive right of the said Keasbey & Mattison to the said trademark, which said question being properly within the cognizance of the civil tribu-

nals before a trial upon the said indictments, a civil 49
suit in equity for an injunction and an accounting was thereupon brought by the said Keasbey & Mattison against the said Brooklyn Chemical Works in the Supreme Court of New York for the City and County of New York, which suit came on for trial at a Special Term of the said Court held on the 3d and 4th days of May, 1892, and was fully tried by the examination and cross-examination of witnesses both for the plaintiffs and the defendants, and after hearing counsel on both sides, and after taking the said case under advise- 50
ment upon the evidence and the arguments and briefs of counsel, and duly considering the said case, the said Court subsequently rendered its opinion and judgment fully sustaining the title of the said Keasbey & Mattison to the said trademark, and overruling all the defenses interposed by the defendants; and directing the issue of an injunction and a reference for an accounting against the said defendants, as prayed for by the plaintiffs in their complaint; and, although the said judgment was subsequently reversed 51
and a new trial ordered by the General Term of the said Court, the said plaintiffs appealed to the Court of Appeals of the said State, which Court, after hearing the said appeal, and on the 5th day of June, 1894, rendered its opinion and judgment, reversing the order of the said General Term granting a new trial of the said case, and directing that the judgment entered upon the decision of the Special Term be affirmed, with costs in all Courts to the plaintiffs, by which decision the exclusive right of the 52
said Keasbey & Mattison to the said trademark "Bromo Caffeine" and the prefix "Bromo" was fully vindicated and established by the Court of last resort in the said State.

THIRTEENTH.—And your orator further alleges that other forms of infringement of the said trademark,

53 more insidious, but none the less fraudulent, wrongful and injurious, have been resorted to and practiced, and are still resorted to and practiced, by other imitators of "Bromo Caffeine," and that one of the said forms of infringement has arisen and is successfully practiced in the following circumstances: Your orator alleges that druggists and the public generally in buying, selling, or referring to "Bromo Caffeine," ever since the same came into general and popular use, have been accustomed to designate it by the short and emphatic
54 term "Bromo," and that the same has been generally known as "Bromo" as well as by its full and extended name "Bromo Caffeine," and that such designation "Bromo" has at the same time been just as certain and definite as "Bromo Caffeine," and until the confusion and uncertainty caused by the acts of defendants and others, as hereinafter set forth, the term "Bromo," in its use in common parlance, was quite as well understood to refer only to "Bromo Caffeine," as any other short and abbreviated terms are understood to refer to
55 their respective full and proper names; and, furthermore, that in popular use as a druggist's article "Bromo Caffeine" was, and still is, not only sold in its original packages or bottles, but that it has been, and is still, largely dispensed by druggists in doses, and generally taken by being mixed or dissolved in Soda Water, Seltzer Water, Lithia Water, Vichy Water, Geyser Water and various other carbonated and other mineral waters, both natural and artificial, and that in its consumption as a household remedy it is similarly
56 taken or administered. And your orator alleges that the said imitators of "Bromo Caffeine," knowing the fact that the same was commonly designated by the short term "Bromo," and that "Bromo" and "Bromo Caffeine" were, by reason of the great merit and success of the said medicine, substantially the synonyms of "Headache Cure" in the mind of the general public, and that in being

dispensed by druggists and as generally consumed the 57
same is usually dissolved in Soda Water, Seltzer Water,
Lithia Water, Vichy Water, Geyser Water and various
other mineral waters, have set upon the contrivance
of infringing upon "Bromo Caffeine" by using the
term "Bromo" as a catch-word in conjunction with
the various names of such waters, that is to say by
the several names "Bromo Soda," "Bromo Seltzer,
"Bromo Lithia," "Bromo Vichy," "Bromo Geyser,"
"Bromo Sedlits," etc., upon and in connection with
various imitations of the said preparation called 58
"Bromo Caffeine" made by them, which, by associa-
tion of sound and idea, and by the use of the said pre-
fix "Bromo," and by designating them respectively as
"Headache Cures," they have been enabled to palm off
on the public as "Bromo Caffeine" with the respective
qualities of such various mineral waters. And your
orator further alleges that, besides this class of in-
fringers, there is another class of infringers and imita-
tors of "Bromo Caffeine" who, in view of the facts
above stated as to the peculiar meaning and significa- 59
tion of the term "Bromo," instead of employing the
name of some mineral or carbonated water as an ad-
junct, accomplish the same purpose and result by mak-
ing use of the prefix Bromo" in connection with
words denoting the general characteristic, nerve-re-
storing and other qualities and the supposed ingre-
dients of your orator's said preparation, such as
"Bromo Celery," "Bromo Potash," "Bromo Fizz,"
"Effer-Bromo," etc.; and that there is still another
class of such infringers and imitators who use simply 60
the terms "Bromo," "Bromo Salts" and "Bro-
mo-Effervescent Salts," in connection with such
descriptive matter as is calculated to mislead,
and which does mislead, the public into believing
that the same is your orator's said preparation
"Bromo Caffeine." And your orator alleges
that, by resorting to such devices and by making

61 cheaper and inferior articles and selling them at lower prices, all such infringers have succeeded in palming off such imitations upon the public, and that by offering larger profits many of them have also induced many druggists and other sellers of medicines to deal in the aforesaid counterfeits, and both dispense the same and sell them in the original packages as and for such "Bromo Caffeine."

Fourteenth.—And your orator further alleges that
62 the defendant, The E. L. Patch Company, is making at the City of Boston, in the said State of Massachusetts, and selling throughout the United States, including the State of New York, and that the defendants, Henry E. C. Kuehn and Edward H. Lubbers, are also dealing in and selling in the City of New York and other places in the said State, one of the said counterfeits or imitations of "Bromo Caffeine" by the name of "Bromo," and that the said E. L. Patch Company is also making and selling to druggists and dealers
63 throughout the United States, and that the defendants, Henry E. C. Kuehn and Edward H. Lubbers are dealing in and selling to druggists and dealers in medicines in and about the City of New York, the same counterfeit in bottles specially prepared for such druggists and dealers, upon some of which is placed the said term "Bromo," upon others "Bromo Salts," and upon others still "Bromo Effervescent Salts," in connection with the respective names of such druggists and dealers, and which, by association of sound and idea, as aforesaid, and by the
64 use of the said prefix "Bromo" as a catch-word, and also by designating them as "Headache Cures," and by stating one of the ingredients to be Caffeine, the said defendants have been and are still palming off upon the public as and for "Bromo Caffeine;" and your orator further alleges that the defendants have sold, and are now selling the said counterfeits upon the reputation of and as and for "Bromo Caffeine."

and that they have seized upon the said prefix 65
"Bromo" as such catch word, and have respectively made and sold the said counterfeits in bulk and at wholesale, with the intent and purpose of having the same palmed off on the public by dealers and retailers as and for "Bromo Caffeine;" and that by cunning, disingenuous and fraudulent methods of advertising and bill posting, and the printing of the name "Bromo" in letters of the style and appearance of the letters adopted and used by the said Keasbey & Mattison, and continued by your orator for the labels for "Bromo 66
Caffeine," and also by preparing the said imitations in bottles of the same shape and general appearance, and with labels embodying the substance of those for "Bromo Caffeine," and also by stating that the said imitations contain caffeine as an ingredient, and also by selling their said articles at a less price and offering larger profits to druggists and other sellers of medicines, the defendants have also succeeded in persuading such druggists and dealers to substitute the said counterfeit articles in 67
dispensing and otherwise selling "Bromo Caffeine," and that such druggists and dealers, in consequence thereof, have substituted, and are now substituting the said counterfeits in the place and stead of, and as and for "Bromo Caffeine;" all to the great injury and damage of your orator, and which said wrongful and injurious acts of the defendants could not have succeeded, except for the piracy of the said prefix "Bromo," and the substantial representation of the public that the said counterfeits were and are "Bromo 68
Caffeine." And your orator further alleges that by such wrongful and injurious acts the defendants have not only infringed upon the said trademark adopted as aforesaid by the said Keasbey & Mattison, and now used by your orator, but that the defendants have also been guilty of unlawful and fraudulent conduct unfairly representing their said counterfeit articles as "Bromo

69 Caffeine," and that they have not honestly and sufficiently distinguished the said counterfeits from the genuine "Bromo Caffeine," but by the use and piracy of the said prefix "Bromo," and by their other acts in that behalf hereinbefore complained of, they have made such representations and so conducted their business in and about the making and selling of the said counterfeit articles as to mislead and deceive purchasers and the public generally to suppose that the said counterfeit articles were and are made by the said
70 Keasby & Mattison, or by your orator as their successor, and that the same were and are the genuine "Bromo Caffeine."

Fifteenth.—And your orator further alleges that on or about the 1st day of December, 1892, the said copartnership firm of Keasbey & Mattison was dissolved, and their said business converted and formed into the incorporated company of your orator by the name of the Keasbey & Mattison Company, under and
71 pursuant to the laws of the State of Pennsylvania, whereupon their entire business, together with all their rights in, to and concerning the said trademark, was transferred to your orator the said Keasbey & Mattison Company, which thereupon became and has ever since remained the sole owner of the said business and of the said trademark, and which said business your orator has since carried on and now carries on, and which said trademark your orator has ever since used, and still uses, as a trademark for the said medi-
72 cine.

Forasmuch as your orator cannot obtain in an action at law adequate and complete redress for the wrong and injury hereinbefore set forth, and can only be effectually relieved by the interposition and powers of, and according to the process, forms and remedies obtaining in, a Court of Equity,

Your orator, therefore, prays, the premises con 73
sidered, that it may please your Honors to award to it the writ of subpœna directed to the defendant the E. L. Patch Company, and also to the defendants Henry E. C. Kuehn and Edward H. Lubbers, commanding them and each of them, on a day certain to be therein named, to be and appear before this Honorable Court, then and there to answer, but not upon oath, which is hereby waived, all and singular the premises, and that it may also please your 74
Honors to grant to your orator a temporary or provisional writ of injunction, which your orator prays may be made perpetual on the final hearing of this cause, restraining the said defendants and each of them, their and each of their respective attorneys, agents, servants and employés, and all other persons acting under their authority and direction, from the further use of the term "Bromo" upon any article of medicine similar to, or made for the same uses and purposes as that of 75
your orator called "Bromo Caffeine," as aforesaid, and also from further committing the wrongful and fraudulent acts hereinbefore complained of, and that the defendants may be compelled to account to and with your orator for all the profits they may have derived from the sale of the said infringing articles called "Bromo," "Bromo Salts," and "Bromo Effervescent Salts," respectively, and that they may be also adjudged and decreed to pay to your orator such damages as your orator may 76
establish by the verdict of a jury upon a feigned issue which may be awarded to your orator, and that the defendants may be otherwise bound to stand by and perform such other and further or different decree, order or relief in the premises as

77 may be determined by this Honorable Court to be equitable and just.

And your orator, as in duty bound, will ever pray, etc.

JONES & GOVIN,
Solicitors for the Complainant.

EDWARD K. JONES,
Of Counsel.

78 UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

EDWIN H. HAMMER, being duly sworn, deposes and says: That he is the Vice-President of the Keasbey & Mattison Company, the complainant in this cause; that he has read the foregoing bill of complaint and knows the contents thereof; and that the allegations therein contained are true to the knowledge, information and belief of the deponent.

EDWIN H. HAMMER.

79 Sworn to and subscribed before me, }
this 26th day of January, 1895. }

FREDERICK KOPF,
[SEAL.] Notary Public (34),
N. Y. Co.

80

81

(Special Appearance.)

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE KEASBEY & MATTISON COMPANY,
Complainant,

AGAINST

82

THE E. L. PATCH COMPANY and HENRY E. C. KUEHN and EDWARD H. LUBBERS,
Defendants. } In Equity.

To JOHN A. SHIELDS, Esq.,
Clerk of the U. S. Circuit Court
for the Southern District of New York.

83

SIR:

You will please enter my special appearance for the defendant The E. L. Patch Company in the above-entitled suit for the purpose of moving to set aside service of process herein that may be claimed to have been made on said defendant, and for the purpose of pleading in abatement or demurring to the jurisdiction of the Court.

Dated New York March 4th, 1895.

Yours, etc.,

84

WILLIAM A. ABBOTT,
Solicitor for the Defendant
The E. L. Patch Company,
No. 18 Broadway,
New York City,
N. Y.

85

(Notice of Motion.)

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE KEASBEY & MATTISON COMPANY, Complainant,	
86 AGAINST	
THE E. L. PATCH COMPANY, HENRY E. C. KUEHN and EDWARD H. LUBBERS, Defendants.	In Equity.

87

Please take notice that, on the annexed affidavit of Arthur M. Silber, sworn to on the 8th day of March, 1895, and on the bill of complaint in the above-entitled suit and the subpœna issued herein, and on the return of the service of said subpœna by the Marshal, I shall apply to the Circuit Court of the United States for the Southern District of New York, at a stated term thereof, to be held at the rooms thereof in the Post Office building, in the City of New York, in said dis-
88 trict, on the fifteenth day of March, 1895, at eleven o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order setting aside the said alleged service of the said subpœna on the defendant, The E. L. Patch Company, and said return of said service on said defendant, The E. L. Patch Company, as null and void and of no effect, and for such other order or relief as the circumstances of

this case may require and to the Court shall seem 89
meet.

Dated New York, March 8, 1895.

Respectfully yours,

WILLIAM A. ABBOTT,

Solicitor for the Defendant, The E. L. Patch Company for the purposes of this motion.

Messrs. JONES & GOVIN,

Solicitors for Complainant,

45 Cedar St., N. Y. City.

90

(Affidavit on Foregoing.)

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE KEASBEY & MATTISON COMPANY, Complainant,	91
AGAINST	In Equity.
THE E. L. PATCH COMPANY, HENRY E. C. KUEHN and EDWARD H. LUBBERS, Defendants.	

Southern District of New York, ss.:

ARTHUR M. SILBER, being duly sworn, deposes and 92
says:

I.—That he is managing clerk in the office of Mr. William A. Abbott, who has appeared herein specially for the defendant, the E. L. Patch Company.

II.—That the bill of complaint in this suit was filed in the office of the Clerk of this Court, on the 28th

93 day of January, 1895, and that thereupon process of subpœna issued returnable on the first Monday of March, 1895.

III.—That on the seventh day of March, 1895, the Marshal of this district caused to be filed in the office of the Clerk of this Court the original subpœna issued herein, together with his return or certificate of service thereof on the back of same, a copy of which return or certificate is hereto annexed, marked Schedule A, which
94 return or certificate purports to show that said Marshal made service of said subpœna, on the 28th day of January, 1895, at the City of New York, on the defendant, The E. L. Patch Company, by exhibiting the original to, and at the same time time leaving a copy thereof with the defendant, Henry E. C. Kuehn as managing agent of the said The E. L. Patch Company.

IV.—That on the first Monday of March, 1895, Mr. William A. Abbott caused to be filed in the office of
95 the Clerk and to be entered in the rule book his special appearance for the defendant, The E. L. Patch Company, "for the purpose of moving to set aside service "of process herein that may be claimed to have been "made on said defendant and for the purpose of pleading in abatement or demurring to the jurisdiction of "the Court," and also caused to be filed and to be entered a similar special appearance for the defendants, Henry E. C. Kuehn and Edward H. Lubbers.

V.—That no plea, answer or demurrer has been
96 filed in behalf of either of the defendants herein.

ARTHUR M. SILBER.

Sworn to before me this
8th day of March, 1895.

JAMES STIKEMAN,
(Seal.) Notary Public,
Kings County.

Cert. filed in N. Y. Co.

97

(Schedule A.)

I hereby certify, that on the 28th day of January, 1895, at the City of New York, in my District, I served the within Subpœna in Equity upon the within-named Henry E. C. Kuehn and Edward H. Lubbers, by exhibiting to each of them the within original, and at the same time leaving with each of them a copy thereof.

I hereby certify, that on the 28th day of January, 1895, at the City of New York, in my district, I served 98
the within Subpœna in Equity upon the within named The E. L. Patch Company, by exhibiting the original to and at the same time leaving a copy thereof with the defendant, Henry E. C. Kuehn, as managing agent of the said The E. L. Patch Company.

Dated Mar. 7, 1895.

JOHN H. McCARTY,
United States Marshal,
Southern District of New York.

[Endorsed:]—U. S. Circuit Court, Southern District of 99
New York, The Keasbey & Mattison Company against The E. L. Patch Company, Henry E. C. Kuehn and Edward H. Lubbers.—Affidavit and Notice of Motion.—William A. Abbott, 18 Broadway, New York, N. Y., Solicitor for the defendant, The E. L. Patch Company for the purpose of this motion.—Service of a copy of the within affidavit and notice of motion this day is hereby admitted.—Dated, New York, Mar. 8th, 1895.—Jones & Govin, Sol'rs for Compl't.

U. S. Circuit Court.—Filed Apr. 2, 1895.—John A. 100
Shields, Clerk.

101

(Memorandum of Lacombe, J.)

Motion to set aside service and dismiss for lack of jurisdiction as to the defendant, "The E. L. Patch Company," is granted. Shaw *v.* Quincy Mining Co., 145 U. S., 444; Empire, &c., Coal Co. *v.* Empire Mining Co., 150 U. S., 163; Union Switch & Signal Co. *v.* Hall Signal Co., 65 Fed. Rep., 625.

April 2d.

E. H. Lacombe,

102 U. S. C. J.

(Order setting aside service, etc.)

At a Stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms in the

103 City of New York, on the 15th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Present—The Honorable E. Henry Lacombe,
Circuit Judge.

The Keasbey & Mattison Company,

104 Complainant,

against

The E. L. Patch Company, Henry E. C. Kuehn and Edward H. Lubbers,

Defendants.

On reading and filing notice of motion of The E. L. Patch Company, one of the defendants, for an order

setting aside the alleged service on it of the subpœna 105
issued herein, etc., together with the affidavit of Arthur M. Silber thereto annexed, with proof of due service of said notice of motion and affidavit on complainant's solicitors, and on the bill of complaint and subpœna issued therein and on the return of service of said subpœna by the Marshal, and the motion having this day coming on to be heard; after hearing Mr. William A. Abbott, solicitor and of counsel for said defendant, The E. L. Patch Company, in support of said motion, and Mr. 106
Edward K. Jones, of counsel for the complainant, in opposition,

On motion of Mr. William A. Abbott, solicitor for said defendant, The E. L. Patch Company, it is

Ordered that the said motion be and hereby is granted, and that the said service of the subpœna issued herein purported to have been made by the Marshal of this district on the said The E. L. Patch Company be and the same is hereby set aside as null and void and of no effect, and that the said The E. L. Patch 107
Company is hereby relieved from appearing to plead or answer to the complaint or otherwise herein.

E. HENRY LACOMBE,
U. S. Circuit Judge.

108

109

(Certificate of Clerk.)

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the Writings annexed to this certificate are true copies of their respective Originals, on file, and remain-
110 ing of record in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York,
[SEAL.] in the Second Circuit, this fifth day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the independence of the said United States the one hundred
111 and nineteenth.

JOHN A. SHIELDS,
Clerk.

112

Livingston Middleditch Co., 149 to 153 Leonard St.

Office Supreme Court, U. S.
FILED.
APR 17 1896
JAMES H. McKENNEY,
Clerk.

Telephone Franklin 186.

Supreme Court of the United States,

OCTOBER TERM, 1894.

Ex Parte

THE KEASBEY & MATTISON COMPANY,
Petitioner.

Original.
No. 13.

Brief in support of motion for rule to show cause why mandamus should not issue.

STATEMENT.

This is a motion for a rule to be issued to the Judges of the Circuit Court of the United States for the Southern District of New York, requiring them to show cause why a writ of mandamus should not be issued commanding them to take jurisdiction and proceed to hear and determine a certain cause wherein the above-named petitioner The Keasbey & Mattison Company is complainant, and the E. L. Patch Company and one Henry E. C. Kuehn and one Edward H. Lubbers are defendants.

The facts of the case and the general grounds of the application are fully set forth in the petition, and, therefore, they need not be repeated here except so far as to say that the general purport of the allegations of the petition is that the Circuit Court wrongfully refused to take jurisdiction of the defendant the E. L. Patch Company, a Massachusetts corporation doing business and committing the injury complained of in the City of New York, and having

a general agent there upon whom service was made in accordance with the local law.

The suit was brought under the seventh section of the Act of March 3, 1881 entitled " An act to authorize the registration of trademarks and protect the same "(21 Stat L., 502) which provides, among other things, " that the Courts of the United States shall " have original and appellate jurisdiction in such cases " without regard to the amount in controversy."

The Circuit Court dismissed the suit for supposed want of jurisdiction upon the ground that the first section of the subsequent Judiciary Act of March 3, 1887, as amended by the Act of August 13, 1888, (25 Stat. L. 433) which provides that jurisdiction shall be exercised only in cases involving the sum or value of two thousand dollars, exclusive of interest and costs, and that no civil suit shall be brought before the Circuit Courts against any person in any other district than that whereof he is an inhabitant, except where the jurisdiction is founded only on the fact that the action is between citizens of different States, in which case suit shall be brought only in the district of the residence of the plaintiff or the defendant, was applicable to the suit of the petitioner, and prevented the exercise of jurisdiction over the defendant corporation.

As a matter of fact, the suit involves over two thousand dollars, exclusive of interest and costs, and this is alleged in the bill (see Bill, par. 3, Record annexed to the petition), so that the requirement of the Act of 1887 as amended by the Act of 1888 is satisfied in this particular; but this is a mere incidental fact in this case, and the matter is referred to simply to show the inconsistency of the first section of the Act of 1887 as amended with the trademark act of 1881, and, therefore, its inapplicability to all cases growing out of infringements of trademarks as a class, in which, of course, this must be placed notwithstanding its particular incidental features.

The bill shows two grounds of jurisdiction, namely, first, because the suit arises under the laws of the United

States, to wit, the statute relating to trademarks, and secondly, diverse citizenship of the parties; but for the purposes of the present question only the first ground need be noticed, for it is conceded that if the case depended "only on the fact that the action is between citizens of different States" the suit as to the E. L. Patch Company should have been brought either in Pennsylvania, where the plaintiff resides, or in Massachusetts, where the defendant corporation resides.

POINTS.

In supporting the present application for a rule to show cause, it is conceived that the Court merely requires such a brief presentation of the case as will enable it to decide whether or not there is sufficient ground for issuing it, and would prefer to have left until the return such further argument as may be proper upon a full discussion of the case. The chief points relied upon with the citation of a few cases will, therefore, constitute all that is deemed necessary for the present occasion.

It is submitted that the defendant corporation is subject to both the jurisdiction and process of the Circuit Court:

1. Because the suit being under the statute authorizing suits for infringement of trademarks, the defendant cannot avail itself of the privilege of being sued only in the State and district of its inhabitancy, as provided by the subsequent Act of 1887 as amended by the Act of 1888.

2. Because by doing business in the State and having a general agent there, the defendant has *waived* its privilege of being sued only in the State of its inhabitancy.

Preliminary to briefly discussing each of these points, it is perhaps well to observe that the present question does

not strictly relate to the *jurisdiction* of the Court. The fact that the controversy arises under the trademark law of the United States, as well as the fact that it is between citizens of different States, gives the Court *jurisdiction*. The question is: Has this defendant *the privilege of being sued only in the District of its incorporation?*

It has been expressly decided by this Court that if the Court has *jurisdiction* by reason of the nature of the controversy, the act of Congress prescribing the *place* where a defendant may be sued is not one affecting the *jurisdiction*, but a *privilege* which may be waived either *expressly or impliedly* by the acts of the defendant.

In *Ex parte* Schollenberger, 96 U. S., 369, Chief Justice Waite, in delivering the opinion of the Supreme Court, said:

"The act of Congress prescribing the place where "a person may be sued is not one affecting the gen- "eral jurisdiction of the Courts. It is rather in the "nature of a personal exemption in favor of a defend- "ant, and it is one which he may waive."

See also Consolidated Store-Service Co. *v.* Lamson Consolidated Store-Service Co., 41 Fed. Rep. 833.

I.

The Court having jurisdiction of the suit, the Defendant cannot avail itself of the privilege of being sued only in the District of its organization because the suit being brought under the trademark statute, and that statute not containing the restriction contained in the Act of 1887, as amended by the Act of 1888, the latter does not apply.

The principle upon which this point is supported was distinctly laid down by this Court in the case of *In re* Hohorst, 150 U. S., 653, 661, where it was held that a general act relating to the jurisdiction of the Circuit Courts subsequently enacted, does not affect prior acts relating to jurisdiction over a specified class of cases, and it was accordingly held in that case that the restriction as to the *place* of bringing the suit contained in the act of 1887, as amended, did not apply.

Upon this point this Court said :

" Moreover, the present suit is for an infringement of " a patent for an invention, the jurisdiction of the " national courts over which depends upon the *subject-* " *matter*, and not upon the parties." Then, after referring to the prior legislation relating to the jurisdiction in patent cases, and alluding to the first section of the act of 1887, as amended, the Court says :—" The " grant to the Circuit Courts of the United States in " this section of jurisdiction over a class of cases de- " scribed generally as 'arising under the constitution " and laws of the United States,' *does not affect the* " *jurisdiction granted by earlier statutes to any Court* " *of the United States over specified cases of that class.*" And the Court proceeds to give illustrations of the operation of this act in patent cases, and, among other things, of any restriction as to the amount involved, and decides that the clause in the act of 1887 limiting the

place in which the suit is to be brought, does not apply. The same reasoning, it is respectfully submitted, applies to trademark cases, for though jurisdiction as to them is not exclusive, yet by the special act they are within the cognizance of the Circuit Courts irrespective of the amount involved.

The same principle was laid down in the case of the United States *v.* Mooney, 116 U. S., 104, in which the case of the Third National Bank of St. Louis *v.* Harrison, (3 McCrary, 162), was cited with approval.

In the last mentioned case the principle for which we now contend, and which, as before stated, has been twice affirmed by the Supreme Court, was very lucidly discussed by Judge McCrary sitting at Circuit in the Eastern District of Missouri.

In that case the question was whether the general act of 1875 relating to the jurisdiction of the Circuit Courts, affected cases against National Banks, jurisdiction over which had been specially conferred by a previous statute; and the Court, in speaking of the act of 1875, said:

"It is a general statute on the subject of "the jurisdiction of the Circuit Courts, and it "*does not repeal prior statutes conferring juris-*"*diction upon those courts in special cases,* "*or over particular controversies*, unless it is clear "from the language employed that such was the in-"tent of Congress. There is no express repeal of sec-"tion 629 of the Revised Statutes. The law does not "favor a repeal by implication, and in order to sup-"port such a repeal the repugnance between the latter "and earlier statutes must be quite plain. If the sub-"sequent act can be reconciled with the former it will "not be held to repeal it.

"Again, *it is a rule long settled, that a later statute* "*which is general and affirmative in its provisions does* "*not abrogate a former which is particular or special.* "Courts will not allow such an exposition of the stat-"ute as will *revoke or alter*, by construction of gen-"eral words, *a previous special statute*, where the

" words may have their proper operation without it. " These general propositions are so familiar and so well " settled that it is unnecessary to quote authority to " support them."

Applying this principle so recently and pointedly affirmed by the Supreme Court *In re* Hohorst (*supra*), it is plain, we respectfully submit, that, as the suit in question is brought under the trademark statute which, like the patent laws, contains no limitation as to the place of suit and no limitation as to the amount involved (see Act of March 3, 1881, 21 Stat., 502, Sec. 7,) the subsequent restrictions of the exercise of jurisdiction contained in the Act of 1887 as amended do not apply.

Of course, we do not mean to be understood, as suggested by the learned Judge on the argument in the Circuit Court, as maintaining that under the trademark act suits can be brought indiscriminately in *any* District whether the conditions ordinarily incident to the exercise of jurisdiction exist or not. But what we do say is that, as the act of 1887 as amended, does not apply, the only question in cases like the present is, as was held *In re* Hohorst (*supra*) *whether or not the non-resident corporation is doing business in the District and has an agent there upon whom service can be made.*

II.

By doing business in the State the laws of which require a non-resident corporation to designate a general agent upon whom service can be made, the defendant waived its privilege of being sued only in the place of its inhabitancy, and the suit not being one where jurisdiction depends only on diverse citizenship, the Court is not only competent to take jurisdiction, but can clearly subject the defendant to its process.

The Court should bear in mind that this is a case arising under the trademark laws, and, therefore, the decisions in cases where the ground of jurisdiction was diverse citizenship do not apply. This is notably true of the cases of Shaw *v.* Quincy Mining Co., 145 U. S., 444, and Southern Pacific R. R. Co. *v.* Denton, 146 U. S., 202, in which the point decided by the Circuit Court in the cases of Filli *v.* D., L. & W. R. R. Co., 37 Fed. Rep., 65, and National Typographic Co. *v.* N. Y. Typographic Co., 44 Fed. Rep., 711, was involved. Those cases were cases where the sole ground of jurisdiction was diverse citizenship, and both parties being non-residents, it was held, upon a construction of the statute, which provided that in such cases suit could be brought only in the place of the residence of the plaintiff or the defendant, the actions could not be maintained in any other district.

Now, it was held by the Supreme Court in the case of Railway Co. *v.* Harris, 12 Wall., 65, that though a corporation dwelt only in the place of its creation and could not migrate, yet it could exercise its functions in a foreign territory upon such conditions as the law of the place might prescribe, and that when such law prescribed as one of the conditions should be its consent to be sued in such foreign territory, such consent would

be *inferred from the fact that it did business there*, and that this was a *waiver* of its privilege to be sued in the place of its domicil.

The Court said:

"It cannot migrate, but may exercise its authority "in a foreign territory upon such conditions as may be "prescribed by the law of the place. One of these "conditions may be that it shall consent to be sued "there. *If it do business there, it will be presumed to* "*have assented, and will be bound accordingly.* * * * "*We entertain no doubt that it made the company* "*liable to suit where this suit was brought, in all re-* "*spects as if it had been an independent corporation of* "*the same locality.*"

See also Consolidated Store-Service Co. *v.* Lamson Consolidated Store Service Co., 41 Fed. Rep., 833.

We contend that such is this case.

The laws of New York require that, as a condition to doing business in that State, every foreign corporation shall, among other things, *designate a person upon whom service of process shall be made.*

"The General Corporation Law," Laws of 1892, Chap. 687, Sec. 15.

And the New York Code of Civil Procedure (Sec. 432), cited with approval by this Court *In re* Hohorst (p. 663) provides a method of service upon non-resident corporations precisely as done in this case.

The bill alleges that the defendant the E. L. Patch Company is doing business in that State, and that it has a place for the transaction of business in the City of New York, and that the defendants Kuehn & Lubbers are its agents, and the terms of the allegations in that behalf are in substance those of the terms of the statute.

It has been expressely held that when such a designation is made it is a waiver of the privilege of the corporation to be sued in its own district.

See Consolidated Store Service Company *v.* Lamson Store Service Co., 41 Fed. Rep., 833.

In the present case it does not appear that such designation has been in fact made; but under the rule in Railway Co. *v.* Harris (*supra*) the consent to the waiver and agreement to be sued is *implied from the mere fact of doing business.*

This principle is also deducible from the decision of the Supreme Court in the case of *In re* Hohorst (*supra*) where it was held that,

"The firm of Kunhardt & Co. being the financial "agents of the corporation, the office of the firm being "in New York, and being the office of the corporation "for the transaction of its monetary and financial "business in this country, the service of the subpœna "in New York upon the head of the firm as general "agent of the corporation was a sufficient service upon "the corporation. St. Clair *v.* Cox, 106 U. S., 350, "359; Societe Fonciere *v* Milliken, 135 U. S., 304; "Mexican Central Ry *v.* Pinkney, 149 U. S., 194; "N. Y. Code of Civ. Pro., Sec. 432; Tuchband *v.* "Chicago & Alton R. R., 115 N. Y., 437."

Moreover, it is respectfully submitted that the failure of a corporation to comply with the local law will not avail it anything when it comes into a Court having jurisdiction and *pleads a privilege* which the law says it *must waive in order to be permitted to do business there.*

III.

The cases supposed to be opposed have either been overruled or are inapplicable.

The case of Cramer *v.* Singer Mfg. Co., 59 Fed. Rep., 74, and the case of Adriance, Platt Mfg. Co. *v.* McCormick H. Mach. Co., 55 Fed. Rep., 287, are, it is submitted, overruled by the case of *In re* Hohorst (*supra.*)

Moreover, in the report of the case of Cramer *v.* Singer Mfg. Co. there must be a mistake. The Court is reported there as saying that the first section of the

Act of 1887 as amended by the Act of 1888 provides that "when jurisdiction in the Circuit Court depends "upon the subject matter of the action the defendant "must be sued in the district of which he was an inhabit- "ant. When it depends on diversity of citizenship "alone the suit may be brought in the district of "residence of either party." The Act *does not* provide any such thing. The statement is simply that of some decision rendered previously to *In re* Hohorst, which, as above stated, we submit overrules them.

The other cases supposed to apply, namely, Shaw *v.* Quincy Mining Co., 145 U. S., 444; Southern Pacific R. R. Co. *v.* Denton, 146 U. S., 202, and Empire Coal Co. *v.* Empire Coal Co., 150 U. S., 159, were rendered in cases where the jurisdiction depended *only* on diverse citizenship, and they are obviously inapplicable to the present case.

So also is the case of Union Switch Co. *v.* Hall Signal Co., 65 Fed. R., 625. In that case it does not appear that the defendant did business in the State or had an agent therein.

IV.

It is respectfully submitted that the rule applied for should issue.

JONES & GOVIN,
Attorneys for Petitioner.

EDWARD K. JONES,
Of Counsel.